

No. 10258

United States
Circuit Court of Appeals
For the Ninth Circuit.

2318

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

RETA D. MILLER and WARREN D. MILLER,
MARCIA M. MILLER, minors, by Reta D.
Miller, Guardian,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
For the District of Oregon

FILED

NOV - 3 1942

PAUL P. O'BRIEN,
CLERK

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NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

HUNTINGTON, WILSON & DAVIS,
ROLAND DAVIS,

Porter Building,
Portland, Oregon,
for Appellant.

GEORGE NEUNER,

McMinnville, Oregon;

GEORGE WM. NEUNER,

801 Public Service Building,
Portland, Oregon,
for Appellee.

In the District Court of the United States
for the District of Oregon

July Term, 1941.

Be It Remembered, That on the 4th day of September 1941, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, in words and figures as follows, to wit: [1*]

In the District Court of the United States
for the District of Oregon

No. 779

RETA D. MILLER, and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by RETA
D. MILLER, Guardian,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant.

AMENDED COMPLAINT

Come now the above named plaintiffs, and with leave of the Court first having been obtained, file an Amended Complaint, and for their first cause of action against the above named defendant, allege:

*Page numbering appearing at foot of page of original certified Transcript of Record.

I.

That at all times hereinafter mentioned, the plaintiffs were, and now are, residents and citizens of Yamhill County, Oregon, and the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that the amount in dispute herein, exceeds the sum of \$3,000.00 exclusive of interest and costs.

II.

That on the 24th day of December, 1925, the plaintiff, Reta D. Miller, intermarried with Warren L. Miller in the County of Yamhill, State of Oregon, and ever since said date to the 3rd day of December, 1940, being the date of the death of the said Warren L. Miller, as hereinafter alleged, the plaintiff, and the said Warren L. Miller, were wife and husband, and the said plaintiff, Reta D. Miller, is now the surviving wife of the said Warren L. Miller.

III.

That there was born to said union the issue of said marriage, Warren D. Miller, a son, and Marcia M. Miller, a daughter, [2] who are minors and of the ages of eight and three years respectively, and that on the 19th day of August, 1941, the County Court of Yamhill County, Oregon, sitting in probate, appointed the plaintiff, Reta D. Miller, the guardian of said minors, and who now is the duly appointed, qualified and acting guardian of the persons and estates of said minors, Warren D. Miller and Marcia M. Miller.

IV.

That on the 17th day of July, 1939, in consideration of the payment to it of a quarter-annual premium of \$28.62, defendant, by its agent, duly authorized thereto, executed and delivered its policy of life insurance in writing, No. 17 395 774, to the said Warren L. Miller on his life, in the sum of \$3,000.00, payable to Reta D., wife of the insured, or in the event of her death, to Warren D. and Marcia M. Miller, children of the insured, upon receipt of due proof on forms prescribed by the company, of the death of the said Warren L. Miller, and it is further provided in said policy, if death of said Warren L. Miller occurs on or before the 17th day of July, 1954, then the defendant further promised and agreed to pay to the beneficiary of Warren L. Miller, a monthly income of \$30.00 beginning as of the date of the death of the insured, and terminating on the last monthly income date prior to the 18th day of July, 1954. That it is further provided in said policy, and in consideration of such quarter-annual payments made as aforesaid, and as a cumulative rider to said policy, that in the event the said insured, Warren L. Miller, suffered accidental death which resulted directly, exclusively and independently of all other causes, from accidental bodily injuries, whereupon the said defendant further promised and agreed to pay the beneficiary under said policy the further sum of \$3,000.00 upon receipt of due proof on forms prescribed by said company, all according to the terms, stipulations and conditions

therein contained, a photostatic copy of said policy, with the application therefor, and endorsements thereon, is in the [3] hands of the defendant, marked "Exhibit A" and by this reference, made a part of this complaint.

V.

(Amended by order of court Jan. 20, 1942 in open Court.)

That thereafter the said Warren L. Miller continued to pay the quarter-annual premiums upon said policy quarterly and in advance according to the terms and conditions thereof, including the quarterly premium due on July 17, 1940. That on November 13, 1940 said Warren L. Miller gave to defendant a check dated November 17, 1940 in payment of the premium due October 17, 1940. That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940. That said policy remained and was in full force and effect on the 3rd day of December 1940.

VI.

That on the 27th day of November, 1940, in Yamhill County, State of Oregon, said insured, Warren L. Miller, while engaged in his regular vocation, suffered certain bodily injuries, effected solely through external violent and accidental means, from which injuries said Warren L. Miller lingered until the 3rd day of December, 1940, and which resulted in his death on said 3rd day of December, 1940, directly, exclusively and independently of all other

causes and from said accidental, bodily injuries, to-wit: Said insured was attacked and gored by a mad bull while on his farm about 3½ miles Northeast of the city of McMinnville, Yamhill County, Oregon, and while engaged in his regular business of farming and dairying, and which said injuries were not self-inflicted while the said insured was insane or otherwise.

VII.

That thereafter, on the 5th and 20th days of December, 1940, respectively, the plaintiff, Reta D. Miller, gave to the defendant, both to its branch office in the city of Portland, Oregon, and its home office in the city of New York, State of New York, full and complete details of the death of the said insured, Warren L. Miller, and of all circumstances attending the same, and of her relationship to the said insured and of her interest in said accident policy of life insurance, and of all other circumstances attending and surrounding the death of the said Warren L. Miller, [4] and then and there demanded from the defendant its standard blank forms of proof as prescribed by the said defendant in said policy of insurance, so that she might make a duly verified proof of all of said matters and things so communicated to the defendant, as aforesaid, and of all such additional things as might be required by the defendant, and suggested by said blank proof forms.

VIII.

That the defendant then and there refused to furnish to the plaintiffs blank forms, prescribed by the defendant company, and did then and there deny any and all liability resting upon said defendant under said policy, and then and there stated to said plaintiff, and refused to pay any sum of money to plaintiffs by way of indemnity or otherwise. That the defendant had full knowledge of the death of the said insured, and of the manner and cause and circumstances thereof, claiming that the said defendant was in no way liable upon said life insurance policy, and refused to forward its blank forms, further claiming that said policy stood lapsed on the company's record.

IX.

That by reason of the statements made by the defendant to plaintiffs as aforesaid, and by reason of the defendant's denial of its liability upon said life insurance policy, plaintiffs did not furnish defendant affirmative proof of the death of the said insured in writing upon blank forms required by the company as mentioned in said policy of insurance, but in all other respects plaintiff and said insured have duly performed all of the terms and conditions of said contract of insurance herein, on their part to be performed.

X.

That there is now due and owing under and by virtue of the terms of said life insurance policy No. 17 395 774, the sum of \$6,000.00, payable to the designated beneficiary in said policy, with interest

thereon at the rate of 6% per annum and the further sum of [5] \$30.00 per month, for each and every month beginning with the 3rd day of December, 1940, and terminating on the 18th day of July, 1954.

XI.

That the sum of \$1,500.00 is a reasonable sum to be allowed plaintiffs as attorneys fees in this, their first cause of action against the defendant.

Plaintiffs, as a separate, further and second cause of action against the defendant, allege:

I.

Plaintiffs here repeat, re-allege, re-aver, and incorporate by reference, all of the allegations contained in Paragraphs I, II and III of the first cause of action in this complaint and pray that the same may be deemed and taken as a part of this cause of action, the same as though set out at length.

II.

That on the 29th day of February, 1940, in consideration of the payment to it of a quarter-annual premium of \$20.10, the defendant, by its agent duly authorized thereto, executed and delivered its policy of life insurance in writing, No. 17 395 775 to the said Warren L. Miller on his life, to take effect as of the 17th day of July, 1939, in the sum of \$2,000.00, payable to Reta D., wife of the insured, or in the event of her death, to Warren D. and Marcia M. Miller, children of the insured, upon re-

ceipt of due proof on forms prescribed by the company of the death of the said Warren L. Miller, and it is further provided in said policy, if the death of the said Warren L. Miller occurs on or before the 17th day of July, 1959, then the said defendant further promised and agreed to pay to the beneficiary of Warren L. Miller a monthly income of \$20.00, beginning as of the date of the death of the insured and terminating on the last monthly income date prior to [6] the 18th day of July, 1959. That it is further provided in said policy and included in the consideration of said quarter-annual payments as aforesaid, that in the event the said Warren L. Miller suffered death by accidental means, that the said company then and in that event, promised and agreed to pay the beneficiary designated in said policy, an additional amount of \$2,000.00 upon receipt of due proof on forms prescribed by said company, in accordance with the terms, stipulations and conditions contained therein, a photostatic copy of said policy, with the application therefor, and the endorsement thereon, is in the hands of the defendant, marked "Exhibit B", and by this reference, made a part of this complaint.

III.

(Amended by order of Court Jan. 20, 1942
in open Court.)

That thereafter the said Warren L. Miller continued to pay the quarter-annual premiums upon said policy quarterly and in advance according to

the terms and conditions thereof, including the quarterly premium due on July 17, 1940. That on November 13, 1940 said Warren L. Miller gave to defendant a check dated November 17, 1940 in payment of the premium due October 17, 1940. That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940. That said policy remained and was in full force and effect on the 3rd day of December, 1940.

IV.

That on the 27th day of November, 1940, in Yamhill County, State of Oregon, said insured, Warren L. Miller, while engaged in his regular vocation, suffered certain bodily injuries, effected solely through external violent and accidental means, from which injuries said Warren L. Miller lingered until the 3rd day of December, 1940, and which resulted in his death on said 3rd day of December, 1940, directly, exclusively and independently of all other causes and from said accidental, bodily injuries, to-wit: Said insured was attacked and gored by a mad bull while on his farm about 3½ miles Northeast of the city of McMinnville, Yamhill County, Oregon, and while engaged in his regular business of farming and dairying, and which said injuries were not self-inflicted while the said insured was insane or otherwise. [7]

V.

That thereafter, on the 5th and 20th days of December, 1940, respectively, the plaintiff, Reta D.

Miller, gave to the defendant, both to its branch office in the city of Portland, Oregon, and its home office in the city of New York, State of New York, full and complete details of the death of the said insured, Warren L. Miller, and of all circumstances attending the same, and of her relationship to the said insured and of her interest in said accident policy of life insurance, and of all other circumstances attending and surrounding the death of the said Warren L. Miller, and then and there demanded from the defendant its standard blank forms of proof as prescribed by the said defendant in said policy of insurance, so that she might make a duly verified proof of all of said matters and things so communicated to the defendant, as aforesaid, and of all such additional things as might be required by the defendant, and suggested by said blank proof forms.

VI.

That the defendant then and there refused to furnish to the plaintiffs blank forms, prescribed by the defendant company, and did then and there deny any and all liability resting upon said defendant under said policy, and then and there stated to said plaintiff, and it refused to pay any sum of money to plaintiffs by way of indemnity or otherwise. That the defendant had full knowledge of the death of the said insured, and of the manner and cause and circumstances thereof, claiming that the said defendant was in no way liable upon said life insurance policy, and refused to forward its blank forms,

further claiming that said policy stood lapsed on the company's record.

VII.

That by reason of the statements made by the defendant to plaintiffs as aforesaid, and by reason of the defendant's denial of its liability upon said life insurance policy, plaintiffs [8] did not furnish defendant affirmative proof of the death of the said insured in writing upon blank forms required by the company as mentioned in said policy of insurance, but in all other respects plaintiff and said insured have duly performed all of the terms and conditions of said contract of insurance herein, on their part to be performed.

VIII.

That there is now due and owing under and by virtue of the terms of said life insurance policy No. 17 395 775, the sum of \$4,000.00, payable to the designated beneficiary in said policy, with interest thereon at the rate of 6% per annum, and the further sum of \$20.00 per month, for each and every month beginning with the 3rd day of December, 1940, and terminating on the 18th day of July, 1959.

IX.

That the sum of \$1,000 is a reasonable sum to be allowed plaintiffs as attorneys fees in this, their second cause of action against the defendant.

Wherefore, plaintiffs demand judgment against the defendant for the full sum of \$6,000.00, with

interest thereon at the rate of 6% per annum, the further sum of \$30.00 per month beginning as of the 3rd day of December, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1954, and the further sum of \$1,500.00 attorneys fees on the first cause of action; and the sum of \$4,000.00 with interest thereon at the rate of 6% per annum, together with the further sum of \$20.00 per month, beginning as of the 3rd day of December, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1959, and the further sum of \$1,000 attorneys fees on the second cause of [9] action, and for their costs and disbursements herein.

GEORGE NEUNER and

GEORGE WM. NEUNER

801 Public Service Bldg.

Portland, Oregon

Attorneys for Plaintiffs

[Endorsed]: Filed September 4, 1941. [10]

And Afterwards, to wit, on the 9th day of September, 1941, there was duly Filed in said Court, an Answer to Amended Complaint, in words and figures as follows, to wit: [11]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the first cause of action set out in plaintiffs' amended complaint and admits, denies and alleges as follows:

I.

Admits Paragraphs I, II and III of plaintiffs' first cause of action.

II.

Admits that on or about the 13th day of July, 1939, in consideration of the application therefor and of the payment in advance of the sum of \$28.62 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for fifteen full years should have been paid, and of the payment of a reduced premium of \$24.96 every three calendar months thereafter during the lifetime of the insured, defendant issued its Policy of Insurance No. 17 395 774 to Warren L. Miller as the insured, wherein it agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike, [12]

as beneficiary, \$3,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by defendant of the death of said Warren L. Miller, and if such death should occur on or before the 17th day of July, 1954, defendant agreed to pay said beneficiary a monthly income of \$30.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1954; and if due proof of the death of the insured should be received on or before the 17th day of July, 1954, the face amount of the policy was payable upon said date; and if such proof should be received after said date the face amount was payable upon receipt thereof.

Admits that there was a supplemental agreement issued as a part of and attached to said policy wherein in consideration of the payment in advance of an additional quarter-annual premium of \$1.98, which was included in and payable as part of the premium stated in said policy, and of the payment of a like sum as part of each premium after the first payable under said policy, defendant agreed to pay to the beneficiary under said policy \$3,000 upon receipt of due proof on form prescribed by the company that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means.

Admits that said agreements were all according to the terms, stipulations and conditions contained

in said policy, and admits that a photostatic copy of said policy with a copy of the application therefor marked Exhibit "A" was attached to plaintiff's original complaint on file herein, and that defendant has a copy of the same, and deny each and every other allegation set out in Paragraph IV of plaintiff's first cause of action. [13]

III.

Admits that the quarter-annual premiums upon said policy were paid up to and including the quarter-annual premium due July 17, 1940, but no more, and denies that said policy remained and was in full force and effect on the 3rd day of December, 1940, and denies each and every other allegation set out in Paragraph V of plaintiffs' first cause of action, and alleges that said policy lapsed for non-payment of the quarter-annual premium due on October 17, 1940.

IV.

Admits Paragraph VI, VII and VIII of plaintiffs' first cause of action.

V.

Denies each and every allegation contained in Paragraph IX of plaintiffs' first cause of action.

VI.

Denies each and every allegation contained in Paragraph X of plaintiffs' first cause of action and denies that the sums mentioned in said paragraph, or any sum or sums, is now due and payable to

plaintiffs or any of them under and by virtue of the terms of Policy of Insurance No. 17 395 774 or otherwise.

VII.

Denies that the sum of \$1,500.00 or any sum is a reasonable sum to be allowed plaintiffs as attorneys' fees under their first cause of action.

And for a first further and separate answer and defense to plaintiffs' first cause of action defendant alleges:

I.

That on or about the 13th day of July, 1939, in consideration of the application therefor and of the payment in advance of the sum of \$28.62 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, [14] 1939, and a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for fifteen full years should have been paid, and of the payment of a reduced premium of \$24.96 every three calendar months thereafter during the lifetime of the insured, defendant issued its Policy of Insurance No. 17 395 774 to Warren L. Miller as the insured, wherein it agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike,

as beneficiary, \$3,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by defendant of the death of said Warren L. Miller, and if such death should occur on or before the 17th day of July, 1954, defendant agreed to pay said beneficiary a monthly income of \$30.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1954; and if due proof of the death of the insured should be received on or before the 17th day of July, 1954, the face amount of the policy was payable upon said date; and if such proof should be received after said date the face amount was payable upon receipt thereof.

That there was a supplemental agreement issued as a part of and attached to said policy wherein in consideration of the payment in advance of an additional quarter-annual premium of \$1.98, which was included in and payable as a part of the premium stated in said policy, and of the payment of a like sum as part of each premium after the first payable under said policy, defendant agreed to pay to the beneficiary under said policy \$3,000 upon receipt of due proof on form prescribed by the company that the death of the insured resulted directly and independently of all [15] other causes from bodily injury effected solely through external, violent and accidental means.

II.

That said policy contained among its stipulations, provisions and conditions the following:

“Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at five per cent per annum thereon from their respective due dates. Any indebtedness to the Company at date of default, including interest thereon, must be paid, provided, however that if it is not in excess of the Cash Surrender Value as at date of reinstatement it may remain as an indebtedness subject to the loan provisions of this policy.

Rights of Insured.—During the lifetime of the Insured and without the consent of the beneficiary, whether revocably or irrevocably designated, the Insured may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, or allowed hereunder by the Company, unless otherwise specifically provided herein or by indorsement hereon, and except that

any irrevocably designated beneficiary can be changed only with the written consent of such beneficiary.

Payment of Premiums.—All premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

The Contract.—This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the applica-

tion is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any [16] lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of this Policy will be required in any settlement thereof."

III.

That a quarter-annual premium of \$28.62 became due on said policy on October 17, 1940; that said premium was not paid on or before said date or at all, and said insured became in default under the terms of said policy for failure to pay said premium, and said default continued for more than thirty-one days.

IV.

That on November 17, 1940, defendant at its Oregon branch office in Portland, Oregon, received from the insured a check in the amount of \$48.72 payable to defendant's order, dated November 17, 1940, at McMinnville, Oregon, and drawn on the First National Bank of McMinnville, Oregon, and signed by L. A. Miller & Son by Warren L. Miller, the latter being the said insured, which amount equaled the amount of the quarter-annual premium of \$28.62 on Policy No. 17 395 774 and the quarter annual premium of \$20.10 on Policy No. 17 395 775 due on October 17th, 1940; that said check was regularly deposited by the defendant in the usual

course of business in the U. S. National Bank of Portland, Oregon, for presentation to the drawee bank, and in due course said check was presented to said First National Bank of McMinnville, Oregon for payment; that said bank refused payment of said check because the maker of said check did not have sufficient funds on deposit in said bank with which to pay said check; that said check was thereafter returned unpaid to defendant because of the refusal of said bank to honor and pay said check; that thereupon defendant mailed said check to said insured and advised him that said check had not been honored when presented to the bank for payment, and that by reason thereof the said premium was unpaid and that said policy lapsed by reason of [17] such non-payment within the grace period; that the grace period for the payment of said premium due on October 17th, 1940, expired on November 17th, 1940.

That by reason of the non-payment of said premium within the grace period said policy remained in default for non-payment of the premium due on October 17th, 1940, and has never been reinstated; that at the time said policy became in default for the non-payment of said premium said policy had no cash surrender value whatsoever and said policy now stands lapsed and is of no value whatsoever; that by reason of the default in payment of premiums due under said policy there is no sum whatsoever due to the beneficiaries named in said policy, or any of them.

And for answer to plaintiffs' second further and separate cause of action defendant admits, denies and alleges:

I.

Admits Paragraph I of plaintiffs' second cause of action.

II.

Admits that on or about the 29th day of February, 1940, in consideration of the application therefor and of the payment in advance of \$20.10 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for twenty full years shall have been paid, and of a reduced premium of \$16.64 every three calendar months thereafter during the lifetime of the insured, defendant issued its policy of insurance No. 17 395 775 to Warren L. Miller as the insured wherein it agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike, [18]

as beneficiary, \$2,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by the company of the death of said Warren L. Miller, and if such death should

occur on or before the 17th day of July, 1959, defendant further agreed to pay to said beneficiary a monthly income of \$20.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1959, and if due proof of the death of the insured should be received on or before the 17th day of July, 1959, the face amount of the policy was payable upon said date, and if such proof should be received after said date the face amount was payable upon receipt thereof, and defendant further agreed to pay said beneficiary an additional amount of \$2,000 upon receipt of due proof that the death of the insured resulted, before the anniversary of said policy on which the insured's age at nearest birthday is sixty-five, from accidental means as defined in and subject to the provisions set forth under accidental death benefit provisions of said policy.

Admits that said agreements were all according to the terms, stipulations and conditions contained therein, and that a photostatic copy of said policy with a copy of the application therefor and the endorsements thereon, marked Exhibit "B", was attached to plaintiff's original complaint on file herein, and that defendant has a copy of the same, and denies each and every other allegation set out in Paragraph II of plaintiffs' second cause of action.

III.

Admits that the quarter-annual premiums upon said policy were paid up to and including the quar-

ter-annual premium due July 17, 1940, but no more, and denies that said policy remained and was in full force and effect on the 3rd day of December, 1940, and denies each and every other allegation set out in Paragraph [19] III of plaintiffs' second cause of action, and alleges that said policy lapsed for non-payment of the quarter-annual premium due on October 17, 1940.

IV.

Admits Paragraph IV, V and VI of plaintiffs' second cause of action.

V.

Denies each and every allegation contained in Paragraph VII of plaintiffs' second cause of action.

VI.

Denies each and every allegation contained in Paragraph VIII of plaintiffs' second cause of action and denies that the sums mentioned in said paragraph, or any sum or sums, is now due and payable to plaintiffs or any of them under and by virtue of the terms of Policy of Insurance No. 17 395 774 or otherwise.

VII.

Denies that the sum of \$1,000.00 or any sum is a reasonable sum to be allowed plaintiffs as attorneys' fees under their second cause of action.

And for a first further and separate answer and defense to plaintiffs' second cause of action defendant alleges:

I.

That on or about the 29th day of February, 1940, in consideration of the application therefor and of the payment in advance of \$20.10 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for twenty full years shall have been paid, and of a reduced premium of \$16.64 every three calendar months thereafter during the lifetime of the insured, defendant issued its policy of insurance No. 17 395 775 to Warren L. Miller as the insured wherein it [20] agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike,

as beneficiary, \$2,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by the company of the death of said Warren L. Miller, and if such death should occur on or before the 17th day of July, 1959, defendant further agreed to pay to said beneficiary a monthly income of \$20.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1959, and if due proof of the death of the in-

sured should be received on or before the 17th day of July, 1959, the face amount of the policy was payable upon said date, and if such proof should be received after said date the face amount was payable upon receipt thereof, and defendant further agreed to pay said beneficiary an additional amount of \$2,000 upon receipt of due proof that the death of the insured resulted, before the anniversary of said policy on which the insured's age at nearest birthday is sixty-five, from accidental means as defined in and subject to the provisions set forth under accidental death benefit provisions of said policy.

II.

That said policy contained among its stipulations, provisions and conditions the following:

“Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at five per cent per annum thereon from their respective due dates. Any indebted-

ness to the Company at date of default, including interest [21] thereon, must be paid, provided, however, that if it is not in excess of the Cash Surrender Value as at date of reinstatement it may remain as an indebtedness subject to the loan provisions of this policy.

Rights of Insured.—During the lifetime of the Insured and without the consent of the beneficiary, whether revocably or irrevocably designated, the Insured may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, or allowed hereunder by the Company, unless otherwise specifically provided herein or by indorsement hereon, and except that any irrevocably designated beneficiary can be changed only with the written consent of such beneficiary.

Payment of Premiums.—All premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as

may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

The Contract.—This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of this Policy will be required in any settlement thereof."

III.

That a quarter-annual premium of \$20.10 became due on said policy on October 17, 1940; that said premium was not paid on or before said date or at all, and said insured became in default under the terms of said policy for failure to pay said pre-

mium, and said default continued for more than thirty-one days.

IV.

That on November 17, 1940, defendant at its Oregon branch office in Portland, Oregon, received from the insured a check in the amount of \$48.72 payable to defendant's order, dated [22] November 17, 1940, at McMinnville, Oregon and drawn on the First National Bank of McMinnville, Oregon, and signed by L. A. Miller & Son by Warren L. Miller, the latter being the said insured, which amount equaled the amount of the quarter-annual premium of \$28.62 on Policy No. 17 395 774 and the quarter-annual premium of \$20.10 on Policy No. 17 395 775 due on October 17th, 1940; that said check was regularly deposited by defendant in the usual course of business in the U. S. National Bank of Portland, Oregon, for presentation to the drawee bank, and in due course said check was presented to said First National Bank of McMinnville, Oregon, for payment; that said bank refused payment of said check because the maker of said check did not have sufficient funds on deposit in said bank with which to pay said check; that said check was thereafter returned unpaid to defendant because of the refusal of said bank to honor and pay said check; that thereupon defendant mailed said check to said insured and advised him that said check had not been honored when presented to the bank for payment, and that by reason thereof the said premium was unpaid and that said policy lapsed

by reason of such non-payment within the grace period; that the grace period for the payment of said premium due on October 17th, 1940, expired on November 17th, 1940.

That by reason of the non-payment of said premium within the grace period said policy remained in default for non-payment of the premium due on October 17th, 1940, and has never been reinstated; that at the time said policy became in default for the non-payment of said premium said policy had no cash surrender value whatsoever and said policy now stands lapsed and is of no value whatsoever; that by reason of the default in payment of premiums due under said policy there is no sum whatsoever due to the beneficiaries named in said policy, or any of them. [23]

Wherefore, defendant having fully answered plaintiffs' amended complaint prays that the same be dismissed and that defendant have judgment against plaintiffs and each of them for its costs and disbursements herein incurred.

HUNTINGTON, WILSON &
DAVIS

Attorneys for Defendant
ROLAND DAVIS
Of Attorneys for Defendant

(Duly Verified.)

[Endorsed]: Filed September 9, 1942. [24]

And Afterwards, to wit, on the 19th day of September, 1941, there was duly Filed in said Court, a Demand for Jury Trial, in words and figures as follows, to wit: [25]

[Title of District Court and Cause.]

DEMAND FOR TRIAL BY JURY

To New York Life Insurance Company, the defendant above named, and Roland Davis, one of its attorneys:

The plaintiffs above named, and each of them, hereby demand a trial by Jury of each and all of the issues presented by the pleadings in the within cause.

Dated this 19th day of September, 1941.

GEORGE WM. NEUNER

Of Attorneys for Plaintiffs

801 Public Service Bldg.

Portland, Oregon

State of Oregon

County of Multnomah—ss.

I hereby certify that on the 19th day of September, 1941, I mailed a certified copy of the within Demand for Trial by Jury, in a postpaid, sealed wrapper, to Roland Davis, one of defendant's attorneys, at his office address, i.e. Porter Bldg., Portland, Oregon.

GEORGE WM. NEUNER

Of Attorneys for Plaintiffs

[Endorsed]: Filed September 19, 1941. [26]

And Afterwards, to wit, on Tuesday, the 20th day of January, 1942, the same being the 67th Judicial day of the Regular November, 1941, Term of said Court; preesnt the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [27]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Pre-trial proceedings before the Honorable Claude McColloch on the 20th day of October, 1941, at 11 o'clock a.m. were had, the plaintiffs appearing in person and by her attorneys, George Neuner and George Wm. Neuner, the defendant appearing by its attorneys, Huntington, Wilson & Davis, whereupon opening statements were made by respective counsel, and the pre-trial exhibits were presented and identified before Alva W. Persons, Court Reporter, and the Pre-trial conference was then adjourned to the 8th day of December, 1941, at which time it was resumed with the identical parties present, briefs having theretofore been filed by the respective counsel, in compliance with the order of the Court, with the result that the trial thereof was set for January 20, 1942, and the following facts were agreed to and stipulated by the respective parties.

ADMITTED FACTS

I.

That the plaintiff is a resident and inhabitant of Yamhill County, Oregon, and that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs. [28]

II.

That the defendant, New York Life Insurance Company, is a foreign corporation, organized under the laws of the State of New York, engaged in a life insurance business with a branch office in the City of Portland, Multnomah County, Oregon.

III.

That the plaintiff, Reta D. Miller, is the widow of Warren L. Miller, deceased, and the mother of Warren D. Miller and Marcia M. Miller, minor children of the plaintiff and the decedent, and she is the duly appointed, qualified and acting guardian of the said Warren D. Miller and Marcia M. Miller.

IV.

That Warren L. Miller was a resident of, and residing on a farm about 3¼ miles Northeast of McMinnville, Yamhill County, Oregon, of the age of 34 years or thereabouts, and engaged in farming and dairying.

V.

On or about the 13th day of July, 1939, defendant issued its policy of life insurance No. 17 395 774

to Warren L. Miller as insured, a resident of the State of Oregon, in which policy in consideration of the payment in advance of the sum of \$28.62, constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for fifteen full years should have been paid, and of the payment of a reduced premium of \$24.96 every three calendar months thereafter during the lifetime of the insured, it agreed that if due proof of the death of the insured was received showing that such death occurred before the 17th day of July, 1954, it would pay to Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be [29] surviving as the benefits under said policy severally become due and payable, share and share alike, as beneficiary a monthly income of \$30.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1954, and to pay to said beneficiary the sum of \$3,000 on the 17th day of July, 1954.

VI.

Attached to said Policy No. 17 395 774 was a supplemental agreement issued as a part of said policy, the premium for which was included in and payable as part of the premium stated in said policy, wherein the defendant agreed to pay to the beneficiary \$3,000 upon receipt of due proof on

forms prescribed by the defendant, that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and occurred within ninety days after such injury and prior to the anniversary of said policy on which the insured's age at nearest birthday is sixty-five.

VII.

On or about the 29th day of February, 1940, defendant issued its policy of insurance No. 17 395 775 to Warren L. Miller as insured, a resident of the State of Oregon, in which policy in consideration of the payment in advance of the sum of \$20.10 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for twenty full years shall have been paid, and of a reduced premium of \$16.64 every three calendar months thereafter during the lifetime of the insured, it agreed that if due proof of the death of the insured was received showing that such death occurred on or before the 17th day of July, 1959, it would pay to Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children [30] of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike, as beneficiary a monthly income of \$20.00 beginning as of the date of the death of the

insured and terminating on the last monthly income date prior to the 18th day of July, 1959, and to pay to said beneficiary the sum of \$2,000 on the 17th day of July, 1959, and further agreed to pay to said beneficiary an additional amount of \$2,000 upon receipt of due proof that the death of the insured before the anniversary of said policy on which the insured's age at nearest birthday is sixty-five resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

VIII.

Plaintiff's Pre-trial Exhibits 1 and 2 hereinafter referred to are the policies of insurance involved in this suit and such policies contain the agreements between the insured and defendant on which this suit is based.

IX.

On October 17, 1940, a premium in the amount of \$28.62 became due on Policy No. 17 395 774, and on the same date a premium in the amount of \$20.10 became due on Policy No. 17 395 775. Under the provisions of both policies the insured was entitled to a grace period of thirty-one days from October 17, 1940, within which to pay said premiums.

X.

On Wednesday, November 13, 1940, A. E. Yount, a soliciting agent of the defendant called on Warren L. Miller at McMinnville, Oregon, at which time

Warren L. Miller gave to A. E. Yount a check (Pl. pre-trial Ex. 4) payable to the order of New York Life Insurance Company in the amount of \$48.72, the amount of the two quarter-annual premiums of said policies due October 17, [31] 1940. This check was dated November 17, 1940, it was signed L. A. Miller & Son by Warren L. Miller, and was drawn on the First National Bank of McMinnville, Oregon. November 17, 1940, was a Sunday.

XI.

In the afternoon of November 13, 1940, Mr. A. E. Yount returned to Portland and delivered the check to the office of R. A. Durham, Cashier of the Oregon Branch Office of defendant. Mr. Durham's office held the check until Monday, November 18, 1940, on which day he made an entry on the Daily Premium and Commission Report (Def. pre-trial Ex. 21). This was the first entry of the remittance on the books of the company. On the same day the cashier deposited the check in the U. S. National Bank of Portland, Oregon. (Def. pre-trial Ex. 12). On the same date, November 18, 1940, the cashier mailed to Warren L. Miller the official premium receipts (Def. pre-trial Exs. 10 and 11) covering the premiums in question.

XII.

The check in due course reached the First National Bank of McMinnville, Oregon, for payment on November 20, 1940. On that date the drawer of the check had a balance on deposit in the First National Bank of McMinnville, Oregon, of \$1.05.

Payment of the check was refused by the First National Bank of McMinnville, Oregon, because the drawer did not have sufficient funds on deposit to honor the check. The check was returned to the U. S. National Bank of Portland, Oregon, on Friday, November 22, 1940. November 21, 1940, was Thanksgiving Day and a holiday.

XIII.

On Monday, November 25, 1940, the check with others was returned to the cashier's office of the defendant and he gave defendant's check to the bank to take up this check with the others which had been returned unpaid. (Def. pre-trial Ex. 15). [32]

XIV.

On Tuesday, November 26, 1940, R. A. Durham, Cashier of the defendant, mailed a letter to the insured at McMinnville, Oregon, (Pl. pre-trial Ex. 3), in which the check was returned to him. On the same day, November 26, 1940, the cashier reversed the entries made on November 18, 1940, on the Daily Premium and Commission Report. (Def. pre-trial Ex. 22).

XV.

In the late afternoon of November 27, 1940, the insured, Warren L. Miller, was attacked and gored by a bull and was found by others in a semi-conscious condition that evening. He was taken to the hospital where he lingered in a coma until 7:00 a. m. December 3, 1940, when he died. (Pl. pre-trial Ex. 7).

XVI.

The plaintiff, Reta D. Miller, received the letter of R. A. Durham dated November 26, 1940, containing the dishonored check on November 28, 1940. On said date, to-wit: November 28th, she secured a postoffice money order (Pl. pre-trial Ex. 8-c) payable to the order of the defendant for the sum of \$49.07 and forwarded this money order to the defendant.

XVII.

On Monday, December 2, 1940, R. A. Durham, Cashier by letter (Pl. pre-trial Ex. 8-a) returned the money order.

XVIII.

On the 4th day of December, 1940, plaintiff notified the defendant of the accident and subsequent death of Warren L. Miller and requested blank forms to make proof of death as provided in said policies of insurance. The defendant refused to furnish said blanks on the ground that the policies had lapsed for non-payment of the premiums prior to the death. [33]

XIX.

The Oregon Branch Office of the defendant is closed on Sunday and was not open for business on Sunday, November 17, 1940. The banks of the State of Oregon were closed on Sunday and were not open for business on November 17, 1940.

XX.

It is agreed that the death of Warren L. Miller resulted directly and independently of all other

causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury, and that said death occurred before the anniversary of said policy on which the insured's age at nearest birth date was sixty-five.

EXHIBITS

The following documents were presented by the Plaintiffs and identified as exhibits for use in the trial of said cause, to-wit:

1. Plaintiffs' Pre-trial Exhibit No. 1—New York Life Ins. Co. Policy No. 17 395 774 dated July 17, 1939, for \$3,000 on the life of Warren L. Miller, payable to plaintiffs.

2. Plaintiffs' Pre-trial Exhibit No. 2—New York Life Ins. Co. Policy No. 17 395 775 dated February 29, 1940, effective as of the 17th day of July, 1939, in the sum of \$2,000 on the life of Warren L. Miller, payable to plaintiffs.

3. Plaintiffs' Pre-trial Exhibit No. 3—Letter dated November 26, 1940, by R. A. Durham, cashier, to Warren L. Miller, General Delivery, McMinnville, with reference to the two policies.

3-a. Plaintiffs' Pre-trial Exhibit No. 3-a—Registered envelope addressed to Warren L. Miller, General Delivery, McMinnville, Oregon, in which Pre-trial Exhibit No. 3 was mailed.

4. Plaintiffs' Pre-trial Exhibit No. 4—Check dated November 17, 1940, on the First National Bank of McMinnville, [34] Oregon, payable to New

York Life Ins. Co. in the sum of \$48.72, signed L. A. Miller & Son by Warren L. Miller.

5. Plaintiffs' Pre-trial Exhibit No. 5—Bank statement of the First National Bank of McMinnville, Oregon, for the month of November, 1940, showing the condition of the bank account during the month of November, 1940.

6. Plaintiffs' Pre-trial Exhibit No. 6—Check book stub or the stub of the check for Plaintiffs' Pre-trial Exhibit No. 4.

7. Plaintiffs' Pre-trial Exhibit No. 7—Certified copy of death certificate of Warren L. Miller.

8. Plaintiffs' Pre-trial Exhibit No. 8a—A letter dated December 2, 1940, signed by R. A. Durham, Cashier, addressed to Warren L. Miller, General Delivery, McMinnville, together with original envelope returning United States Postal Money Order No. 312 248, dated November 28, 1940, payable to New York Life Ins. Co. in the sum of \$49.07.

9. Plaintiffs' Pre-trial Exhibit No. 8a accompanied by an envelope in which it was mailed, marked Plaintiffs' Pre-trial Exhibit No. 8b, and said U. S. Postal Money Order marked Plaintiffs' Pre-trial Exhibit No. 8c.

10. Plaintiffs' Pre-trial Exhibit No. 9—A letter dated Portland, Oregon, November 27, 1940, signed by A. E. Yount, with envelope addressed to Warren L. Miller, General Delivery, stamped Portland, November 27, 7 p. m.

Two of Plaintiffs' Pre-Trial Exhibits were sealed

by the Court on behalf of Plaintiffs to be used in said trial as impeachment documents.

The following Exhibits were presented by the Defendant, marked and identified for the use in the trial of said cause, as follows:

1. Defendant's Pre-Trial Exhibit No. 10—Official [35] Premium Receipt on Policy No. 17 395 774, for the quarter-annual premium due October 17, 1940.

2. Defendant's Pre-Trial Exhibit No. 11—Official Premium Receipt on Policy No. 17 395 775 for quarter-annual premium due October 17, 1940.

3. Defendant's Pre-Trial Exhibit No. 12—A deposit slip, or copy thereof, of deposit of New York Life Ins. Co. in the United States National Bank of Portland, Oregon, on November 18, 1940, in which is shown a check on McMinnville Bank for \$48.72.

4. Defendant's Pre-Trial Exhibit No. 13—Slip marked, returned by The First National Bank of McMinnville, Oregon, original checked not sufficient funds.

5. Defendant's Pre-Trial Exhibit No. 14—Returned memo dated November 22, 1940, showing, with one other item, the amount of \$48.72.

6. Defendant's Pre-Trial Exhibit No. 15—Check No. G-2100 dated November 25, 1940, payable to the United States National Bank, signed by New York Life Ins. Co. Account No. 2, by R. A. Durham, Cashier, on which is a notation N. G. checks, and including among others No. 17 395 774-5, Miller.

7. Defendant's Pre-Trial Exhibit No. 16—Letter from Burdett & Neuner, to New York Life Ins. Co., dated December 4, 1940.

8. Defendant's Pre-Trial Exhibit No. 17—Letter to Burdett & Neuner from R. A. Durham, Cashier, dated December 5, 1940.

9. Defendant's Pre-Trial Exhibit No. 18—Letter from H. J. Laramee, Superintendent, to Mr. George Neuner, dated December 17, 1940.

10. Defendant's Pre-Trial Exhibit No. 19—Letter from Burdett & Neuner to New York Life Ins. Co., dated December 20, 1940. [36]

11. Defendant's Pre-Trial Exhibit No. 20—Letter from Louis H. Cooke, General Counsel, to Burdett & Neuner, dated December 27, 1940. In this letter was included a photostatic copy of a letter from R. A. Durham, Cashier, to Warren L. Miller, which is plaintiff's Pre-Trial Exhibit No. 3. The photostat included was not introduced as evidence, because Plaintiffs' Pre-Trial Exhibit No. 3 is the original.

12. Defendant's Pre-Trial Exhibit No. 21—Daily premium and commission report, dated November 18, 1940.

13. Defendant's Pre-Trial Exhibit No. 22—Daily premium and commission report, dated November 26, 1940.

QUESTIONS OF FACT

The ultimate questions of fact to be determined are:

a. Were the policies of insurance in force on the date of death of Warren L. Miller, to-wit: On December 3, 1940?

b. If the policies were in force on December 3, 1940, what is a reasonable attorneys' fee to be allowed the plaintiff?

The answers to the ultimate questions of fact depend on the following questions of fact:

a. Was there any agreement between Warren L. Miller and the defendant to the effect that the check dated November 17, 1940, payable to the order of the defendant would be accepted as unconditional payment of the premiums due on October 17, 1940?

b. Was the check dated November 17, 1940, payable to the order of the defendant accepted by it as unconditional payment of the premiums due on October 17, 1940?

QUESTIONS OF LAW

The following questions of law are involved:

a. In view of the provision in the policies that thirty-one days of grace will be allowed after its due date for the payment of every premium and of the fact that the 31st day after [37] the due date (October 17, 1940) of the premiums was Sunday, November 17, 1940, what was the last day within which the premiums on said policies due October 17, 1940, might be paid without the policies lapsing for non-payment of premiums?

b. If there is any evidence that an agent or cashier of the defendant company agreed to accept or did accept the check dated November 17, 1940, as unconditional payment of the premiums due October 17, 1940, was such agent or cashier authorized so to do by the defendant company?

c. If there is any evidence that an agent or cashier of the defendant company agreed to accept or did accept the check dated November 17, 1940, as unconditional payment of the premiums due October 17, 1940, but was not authorized to do so, was such agreement or acceptance ratified by the defendant company?

PLAINTIFFS' CONTENTIONS

That the check issued by Warren L. Miller and delivered to defendant's cashier on November 13, 1940, post-dated November 17, 1940, and payable to New York Life Ins. Co. for \$48.72 was accepted by the defendant as full payment of the premiums due October 17, 1940 (plfs' pre-trial ex. 4).

That the defendant by its acts and conduct ratified the acts of its agents in accepting said check in full payment of the premiums due October 17, 1940.

That the defendant waived the terms and provisions of its insurance policies and should now be estopped from asserting as a ground of forfeiture thereof the non-payment of such premiums.

That by reason thereof, both policies were in

full force and effect on December 3, 1940, the date of the death of the insured, Warren L. Miller. [38]

DEFENDANT'S CONTENTIONS

It is the defendant's contention that the insured had all day Monday, November 18, 1940, within which to pay the premiums falling due on October 17, 1940.

It further contends that there was no agreement on behalf of defendant, either by an authorized or an unauthorized person, to accept the check dated November 17, 1940, as unconditional payment of the premiums due October 17, 1940, and such check was not so accepted by defendant.

Defendant contends that the defendant did not waive any of the terms or provisions of the insurance policies and it is not estopped from asserting the non-payment of the premiums on said policies. Furthermore, there are no facts or issues in the case upon which a waiver or estoppel can be based.

It contends that the check dated November 17, 1940, was accepted conditionally upon the check being honored when presented for payment; that the check was dishonored when presented for payment and consequently the policies lapsed for non-payment of the premiums due October 17, 1940, and had never been reinstated at the time of the death of the insured. There is, therefore, no liability to the plaintiffs under the policies in suit.

All Done and Dated this 20th day of January,
1942.

CLAUDE McCOLLOCH

District Judge

Approved:

GEORGE NEUNER

Of Attorneys for Plaintiffs

ROLAND DAVIS

Of Attorneys for Defendant

[Endorsed]: Filed January 20, 1942. [39]

And Afterwards, to wit, on the 21st day of
January, 194 , there was duly Filed in said Court,
a Verdict, in words and figures as follows, to
wit: [40]

[Title of District Court and Cause.]

VERDICT

We, the jury empaneled in this action, find in
favor of the plaintiffs and assess the sum of
\$1000.00 as attorney's fees in this action.

Dated January 21, 1942.

FRANK TAYLOR

Foreman

[Endorsed]: Filed January 21, 1942. [41]

And Afterwards, to wit, on Wednesday, the 28th day of January, 1942, the same being the 74th Judicial day of the Regular November, 1941, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [42]

In the District Court of the United States
For the District of Oregon

No. 779

RETA D. MILLER, and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by Reta D.
Miller, Guardian,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant.

JUDGMENT ORDER

The above entitled action came on regularly for trial, on the 20th day of January, 1942, on the issues, and in accordance with the Pre-Trial Order theretofore made and entered in said Court and cause, the plaintiffs appearing in person and by their attorneys, George Neuner and George Wm. Neuner, the defendant appearing by its attorneys, W. M. Huntington and Roland Davis, of Huntington, Wilson & Davis. The jury was regularly

empaneled and sworn to try said action, witnesses on the part of the plaintiffs and defendant respectively were sworn and examined, forms of verdict were agreed upon by the respective parties, and approved by the Court. After hearing the evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and returned into Court the following verdict, in words and figures, omitting title, as follows:

“We, the jury duly empaneled in this action, find in favor of the plaintiffs and assess the sum of \$1000.00 as attorney’s fees in this action.

“Dated January 21, 1942.

FRANK TAYLOR
Foreman” [43]

It Is Therefore Ordered, Adjudged and Decreed that the policies of insurance numbered 17 395 774 and 17 395 775, issued by the above named defendant upon the life of Warren L. Miller and described in the Pre-Trial Order herein were in full force and effect at the time of the death of insured on December 3, 1940.

It Is Further Ordered, Adjudged and Decreed that plaintiff, Reta D. Miller, have and recover judgment from New York Life Insurance Company, defendant above named, for the sum of \$420.00 covering 14 monthly installments of \$30.00 each, covering the period from December 3, 1940 to

January 3, 1942, both inclusive, now payable to said plaintiff under the terms of policy numbered 17 395 774, described in the first cause of action herein, with interest computed at the rate of 6% per annum on each \$30.00 monthly installment from its due date to date of payment; for the further sum of \$3,000.00 covering the amount payable by reason of the double indemnity provisions in said policy with interest thereon at the rate of 6% per annum from December 3, 1940 until paid; for the further sum of \$280.00 covering 14 monthly installments of \$20.00 each, covering the period from December 3, 1940 to January 3, 1942, both inclusive, now payable to said plaintiff under the terms of policy numbered 17 395 775, described in the second cause of action herein, with interest computed at the rate of 6% per annum on each \$20.00 monthly installment from its due date to date of payment; for the further sum of \$2,000.00 covering the amount payable by reason of the double indemnity provisions in said policy last described with interest thereon at the rate of 6% per annum from December 3, 1940 until paid; for the further sum of \$1,000.00 attorney's fees with interest thereon at the rate of 6% per annum from date hereof until paid and for costs and disbursements incurred herein and hereby taxed at \$.....

All Done and Dated this 28th day of January, 1942.

CLAUDE McCOLLOCH

District Judge

[Endorsed]: Filed January 28, 1942. [44]

And Afterwards, to wit, on the 28th day of January, 1942, there was duly Filed in said Court, a Cost Bill, in words and figures as follows, to wit: [45]

[Title of District Court and Cause.]

COST BILL

Statement of Costs and Disbursements claimed by Plaintiffs in the above entitled action:

Clerk's fee, filing complaint.....	\$10.00
United States Marshal, service fee.....	2.06
Reporter fee and transcript of pretrial.....	26.35
To jury Bailiff, ½ charge for jury lunch.....	4.20
Attorneys' fee—prevailing	10.00
Witness fees:	
B. G. Skulason, 1 day.....	2.00
Arthur Lewis, 1 day.....	2.00
<hr/>	
Total.....	\$56.61

State of Oregon

County of Multnomah—ss.

I, George Neuner, being first duly sworn, say that I am one of the attorneys for plaintiffs in the above entitled cause, and except fees of officers, the disbursements set forth in the above have been necessarily incurred by the plaintiffs, who are entitled to recover the same from the defendant. That the witnesses above named were each necessary and material in the trial of said cause, and attended

the trial thereof at the request of plaintiffs as witnesses, only, in said cause.

GEORGE NEUNER

Subscribed and sworn to before me this 27th day of January, 1942.

[Notarial Seal] GEORGE WM. NEUNER

Notary Public for Oregon

My commission expires October 12, 1942.

[Endorsed]: Filed January 28, 1942. [46]

And Afterwards, to wit, on the 30th day of January, 1942, there was duly Filed in said Court, a Motion for Judgment Notwithstanding the Verdict or for New Trial in words and figures as follows, to wit: [47]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, OR FOR A NEW TRIAL

Comes now the defendant and moves the court for an order setting aside the verdict of the jury received in the above entitled case and the judgment order entered thereon and entering judgment in the above entitled case in favor of defendant, in accordance with the motion of defendant heretofore made herein for an order directing the jury to return a verdict in favor of defendant.

This motion is based upon the grounds and for the reasons as follows:

1. There was no evidence that the premiums due on October 17, 1940, on the policies of insurance involved in plaintiff's causes of action were paid when due or during the grace period, or at all.

2. There was no evidence that the defendant agreed to accept, or did accept, the check dated November 17, 1940, payable to the order of the defendant as absolute or unconditional payment of the premiums due October 17, 1940, on said policies of insurance.

3. There was no evidence of a waiver of the provisions of the policies of insurance involved in plaintiffs' causes of action with respect to the payment of premiums. [48]

In the event the court denies the above motion then defendant moves the court for an order setting aside the judgment order described above and granting a new trial in the above entitled case upon the grounds and for the reasons as follows:

1. The court erred in receiving in evidence plaintiffs' pre-trial Exhibits 6, 8a and 8c.

2. The court erred in receiving testimony over defendant's objections relative to plaintiffs' pre-trial Exhibits 6, 8a and 8c.

3. The court erred in receiving testimony over defendant's objections to transactions the witness A. E. Yount had with Warren L. Miller.

4. The court erred in receiving testimony over defendant's objections relative to matters occurring prior to the receipt by defendant of the check dated November 17, 1940.

5. The court erred in receiving testimony over defendant's objections relative to matters occurring subsequent to the mailing of plaintiffs' Exhibit No. 3 returning the check to the insured.

6. The court erred in submitting the case to the jury on any issue of fact.

7. The court erred in failing to give defendant's requested instructions 3, 4, 5, 6, 7, 8 and 9.

8. The court erred in instructing the jury with reference to the acceptance of the check as payment in failing to distinguish between conditional payment and absolute or unconditional payment; the instructions by the court with respect to "intention" as to payment were confusing and misleading and were not a correct and accurate statement of the law.

9. The court erred in submitting to the jury the question of Mr. Durham's authority, in that the uncontradicted evidence showed that Mr. Durham had no authority to accept the [49] check as unconditional payment or to waive any of the company's rights or requirements.

HUNTINGTON, WILSON &
DAVIS

Attorneys for Defendant
ROLAND DAVIS
Of Attorneys for Defendant
514 Porter Building
Portland, Oregon

Please Take Notice that the foregoing motions

will be placed upon the motion calendar for February 16, 1942.

ROLAND DAVIS

Of Attorneys for Defendant

[Endorsed]: Filed January 30, 1942. [50]

And Afterwards, to wit, on the 20th day of April, 1942, there was duly Filed in said Court, a memorandum Opinion in words and figures as follows, to wit: [51]

[Title of District Court and Cause.]

MEMO DENYING JUDGMENT NOV AND
NEW TRIAL

The question of the extent of defendant cashier's authority was not briefed before trial, and I desired to consider it further. My feeling that this was a jury question is strengthened by the recent opinion in this Circuit of *New York Life Insurance Company v. Lois Rogers*, decided March 16, 1942. Defendant's motion for judgment notwithstanding the verdict or for a new trial is therefore denied.*

Dated this 20th day of April, 1942.

CLAUDE McCOLLOCH,
Judge.

*Note—Since this case has been so well briefed and argued, I hope at a later date to file a memo-

random setting forth the contentions of the parties with authorities and the conclusions reached at the trial. C. McC.

[Endorsed]: Filed April 20, 1942. [52]

And Afterwards, to wit, on Tuesday, the 5th day of May, 1942, the same being the 56th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [53]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT OR FOR
A NEW TRIAL.

The Motion for Judgment Notwithstanding Verdict or for a new trial, filed by the defendant in the above entitled court and cause came on for hearing on the 20th day of February, 1942, the plaintiff appearing by her attorneys, George Neuner and George Wm. Neuner, the defendant appearing by its attorneys, Huntington, Wilson & Davis, and after hearing the argument of counsel, the court took said matter under advisement, and now being fully advised in the premises, it is hereby

Ordered that said Motion for Judgment Notwithstanding Verdict or for New Trial, be, and the same hereby is denied.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 5, 1942. [54]

And Afterwards, to wit, on the 13th day of July, 1942, there was duly Filed in said Court, a Notice of Appeal in words and figures as follows, to wit:
[55]

[Title of District Court and Cause.]

Notice Is Hereby Given that New York Life Insurance Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled court and cause on January 28, 1942, and from the whole thereof.

Dated this 13th day of July, 1942.

W. M. HUNTINGTON,
ROLAND DAVIS,

Attorneys for Appellant, New
York Life Insurance Com-
pany, 514 Porter Building,
Portland, Oregon.

[Endorsed]: Filed July 13, 1942. [56]

And Afterwards, to wit, on the 16th day of July, 1942 m, there was duly Filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[57]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, That we, New York Life Insurance Company, a corporation, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, with its head office in the City of Baltimore, Maryland, as Surety, are held and firmly bound unto Reta D. Miller and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, their guardian, in the full and just sum of Ten Thousand Dollars (\$10,000), to be paid to the said Reta D. Miller and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, their guardian, their executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors jointly and severally by these presents.

Whereas, lately at a District Court of the United States for the District of Oregon in an action pending in said court between Reta D. Miller and Warren D. Miller, Marcia M. Miller Minors, by Reta D. Miller, their guardian, as plaintiffs, and New York Life Insurance Company, a corporation, as Defendant, a judgment was renrered against the said New York Life Insurance Company, and the said New York Life Insurance Company hav-

ing filed in said court a Notice of Appeal to reverse the judgment in the aforesaid [58] action on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals.

Now the condition of the above obligation is such that if said New York Life Insurance Company shall prosecute its appeal to effect and satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands this 13th day of July, 1942.

NEW YORK LIFE INSUR-
ANCE COMPANY,

a corporation,

By R. A. DURHAM,

Its Attorney-in-Fact,

Principal

(Seal Fidelity & Deposit Company)

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

a corporation.

By CLARENCE D. PORTER,

Its Attorney-in-Fact,

Surety

The within and foregoing bond is approved as to amount, sufficiency and form, and is hereby allowed as a Superseadeas this 15th day of July, 1942.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 16, 1942. [59]

And Afterwards, to wit, on the 27th day of July, 1942, there was duly Filed in said Court, a Designation of Record on Appeal, in words and figures as follows, to wit: [60]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant, New York Life Insurance Company, in accordance with Rule 75 of the Federal Rules of Civil Procedure, hereby designates the complete record, proceedings, and evidence in the above entitled cause to be contained in the record on appeal.

HUNTINGTON, WILSON &
DAVIS,
(sgd) W. M. HUNTINGTON,
(sgd) ROLAND DAVIS,

Attorneys for New York Life
Insurance Company, Appel-
lant, 514 Porter Building,
Portland, Oregon.

State of Oregon,
County of Multnomah—ss.

I hereby certify that on the 25th day of July, 1942, I placed a true, full and correct copy of the foregoing Designation of Record on Appeal in an envelope addressed to George Neuner, Attorney-at-Law, McMinnville, Oregon, who is one of the attorneys for plaintiffs' appellees, and said envelope with first-class postage thereon fully prepaid was deposited by me in the United States mail on said 25th day of July, 1942.

ROLAND DAVIS,

Of Attorneys for Appellant.

[Endorsed]: Filed July 27, 1942. [61]

And Afterwards, to wit, on Wednesday, the 12th day of August, 1942, the same being the 33rd Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [62]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND
DOCKET APPEAL WITH APPELLATE
COURT

It appearing to the Court that the time to file and docket the appeal of the above entitled cause in the

Appellate Court has not expired, upon application of the Appellant,

It Is Hereby Considered, Ordered and Adjudged that the time within which Appellant may file and docket its appeal of the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended to and including the 22nd day of September, 1942.

Dated this 12th day of August, 1942.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 12, 1942. [63]

And Afterwards, to wit, on the 15th day of August, 1942, there was duly Filed in said Court, a Stipulation of Contents of Record on Appeal, in words and figures as follows, to wit: [64]

[Title of District Court and Cause.]

STIPULATION OF CONTENTS
RECORD ON APPEAL

It Is Hereby Stipulated by the Appellant and Appellees by their respective attorneys of record that the record on appeal in the above entitled cause shall include the following documents and exhibits and no others, to-wit:

1. Amended Complaint
2. Answer

3. Demand for Trial by Jury
4. Pre-Trial Order
5. Jury Verdict
6. Judgment Order
7. Transcript of Testimony
8. All Exhibits
9. Cost Bill
10. Motion for Judgment Notwithstanding Verdict, or for a New Trial
11. Memorandum Denying Judgment NOV and New Trial
12. Order Denying Motion for Judgment Notwithstanding Verdict or for a New Trial
13. Notice of Appeal
14. Bond on Appeal
15. The Designation of Record on Appeal
16. This Stipulation of Contents Record on Appeal

Dated this 8th day of August, 1942.

GEORGE NEUNER,

Of Attorneys for Appellees.

ROLAND DAVIS,

Of Attorneys for Appellant.

[Endorsed]: Filed August 15, 1942. [65]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 65 inclusive, constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 779, in which Reta D. Miller, and Warren D. Miller, Marcia M. Miller, minors, by Reta D. Miller, Guardian, are plaintiffs and appellees, and New York Life Insurance Company, a foreign corporation, is defendant and appellant; that said transcript has been prepared by me in accordance with the designation and the stipulation of contents of the record on appeal filed therein by appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designation and stipulation.

I further certify that I am transmitting with said transcript, the duplicate of the reporter's transcript filed in the Clerk's office, together with the dupli-

cate of the exhibits Nos. 1, 2, 3, 3-a, 4, 5, 6, 7, 8-a, 8-c, 10, 11, 12, 13, 14, 15, 21, and 22, being all of the exhibits received in evidence at the trial.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$9.75 for comparing and certifying the within transcript, making a total of \$14.75 and that the same has been paid by the said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 15th day of September, 1942.

[Seal]

G. H. MARSH,
Clerk. [66]

[Title of District Court and Cause.]

TESTIMONY

Portland, Oregon,
Tuesday, January 20, 1942.

10:00 o'clock A. M.

Before: Honorable Claude McColloch, Judge, and
a jury.

Appearances:

Messrs. George Neuner and George Wm. Neuner, Attorneys for the Plaintiffs;

Messrs. Huntington, Wilson & Davis (by Messrs. W. M. Huntington and Roland Davis), Attorneys for the Defendant.

TRIAL PROCEEDINGS

The Court: Ready?

Mr. Neuner: Yes. [1*]

The Court: Ready, Mr. Davis and Mr. Huntington?

Mr. Davis: Yes.

Mr. Neuner: If your Honor please, some question was raised here during the argument and pre-trial in this case relative to the question of waiver in this matter, and I observe from counsel's remarks made during the proceedings that no foundation was laid in the pleadings. In order to avoid any possible contingency in that regard, while we

*Page numbering appearing at top of page of original Reporter's Transcript.

believe that the allegation that the policies were in full force and effect on that date would probably cover it, and we have some authority to that effect, nevertheless, we would like to amend Section V on page 3 of the amended complaint by substituting this paragraph for the Paragraph V:

“That thereafter the said Warren L. Miller continued to pay the quarter-annual premiums upon said policy quarterly and in advance according to the terms and conditions thereof, including the quarterly premium due on July 17, 1940. That on November 13, 1940 said Warren L. Miller gave to defendant a check dated November 17, 1940 in payment of the premium due October 17, 1940. That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940. That said policy remained and was in full force and effect on the 3rd day of December, 1940.”

And we likewise offer the same amendment to Paragraph III on page 6 of the amended complaint, of the second cause of [2] action, to avoid any possible question as to the pre-trial order setting forth the contention of plaintiff that the terms and conditions of the policies had been waived by reason of the acceptance of this check.

The Court: I can hear you at recess or now, as you please.

Mr. Davis: Well, if the Court please, we think, if this amendment is to be allowed—of course, we

are objecting to it—that we should have some further pre-trial conference to ascertain what he is claiming in regard to this, so that we may be able to meet it.

The Court: We will adjourn to chambers. Just have the jury remain in the room.

(Thereupon the Court, counsel and the court reporter retired to the Court's chambers, where the following occurred without the presence of the veniremen:)

Mr. Davis: For the purpose of the record, we would object to allowing the amendment at this time, after the pre-trial order has been made and entered and the parties have prepared their cases on the basis of the pleadings as they were and upon the pre-trial order. We further object to the amendment, or to that portion of the amendment, as follows: "That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940", on the ground that the pleading is a conclusion. If the plaintiffs claim that the check was accepted on that date as uncon- [3] ditional payment, then we think that they should allege the facts which they claim constitute an acceptance.

The Court: I will allow the amendment and the defendant may make appropriate amendments to its pleading at any time during the trial, and an exception is allowed to the defendant.

Mr. Davis: Now we would like to know, before we go into the trial, just what the plaintiffs claim

for this and what they are relying upon, the same as they should prior to the pre-trial order.

The Court: You mean what they claim for the amendment?

Mr. Davis: Yes; and what acts they claim constituted what they say is full payment or acceptance.

Mr. Neuner: We claim, your Honor, nothing different than the proceedings had in pre-trial conference. It has been our contention all the way through that the check was delivered on the 13th of November, 1940, to the cashier of the defendant, at its branch office in the City of Portland, Oregon, and that by that delivery to the defendant and by its conduct and dealings with reference to the check, that the insured was led to believe honestly that his insurance was in effect, and that by reason thereof, by the acceptance of that check, which was in the custody of the defendant from the 13th until it was returned on the 26th, constituted an acceptance and thereby was full payment of the premiums on both policies.

Mr. Davis: Do I understand that you are not claiming that [4] there was an agreement to accept the check?

Mr. Neuner: That is a matter that might be inferred from the facts and circumstances, conduct and dealings in connection with the acceptance and the holding of the check. I can't prove an express agreement, but there is evidence of an implied agreement.

Mr. Davis: There is evidence of what?

Mr. Neuner: There probably will be evidence of an implied agreement. That is inferred from the transactions themselves.

Mr. Davis: Well, do I understand that you claim that the handing over of the check to the cashier and his leaving it in his office from the 13th to the 18th and then entering it on his books constitutes an implied agreement?

Mr. Neuner: That is a question I am not concerned with. When we delivered the check and the check was delivered to the defendant we claim that there was an acceptance of the check.

Mr. Davis: I know. I am trying to get your position now, as to whether you are going to rely upon an agreement or implied agreement. If you are relying on an implied agreement or an agreement I want to know what facts you claim constituted such an agreement or implied agreement.

Mr. Neuner: I don't have to rely on an agreement to constitute payment. The position I am taking is that the check was accepted as payment of those premiums. Now whether there was an agreement, I am not concerned with it. [5]

Mr. Davis: I understand, Mr. Neuner, there are two positions you might take. One is that the facts here constituted an acceptance of the check, which apparently is the position you are taking. The other position is that there was an agreement made and entered into to accept the check. Now I want to eliminate one or the other.

Mr. Neuner: Well, I don't think you are entitled to have them eliminated. I think they are both in the case, and as far as that is concerned, by the acceptance of the check by the defendant you might infer that credit was extended. I am not concerned about that. What we are concerned with is that the check was accepted, and if it was accepted it created an obligation which didn't theretofore exist and paid the premiums on both policies.

Mr. Davis: Well, I still think that your positions are not exactly the same. One constitutes an agreement and the other the acts themselves. An agreement is where both parties are advised of the circumstances and act upon them. They enter into an agreement to accept the check as payment——

Mr. Neuner: Well——

Mr. Davis: ——and I am trying to eliminate one.

Mr. Neuner: Yes. My witness is dead. He can't say what the agreement was there. I think you are unfair, Mr. Davis, on that proposition.

Mr. Davis: No. I think that we are entitled to know the posi- [6] tion that you are going to take.

Mr. Neuner: Well, I am taking the position, just as I have clearly stated, and I have stated it all the way through. Now if anyone wants to infer an implied agreement there to extend credit, that is in the case. I can't prove an agreement, an express agreement.

The Court: I think we had better go out, gentlemen.

Mr. Davis: There are one or two other questions here, I suppose by the words "full payment" here you mean unconditional payment?

Mr. George Wm. Neuner: I think the language there is "accepted as payment".

Mr. Davis: Well, you say "accepted as full payment".

Mr. George W. Neuner: Full payment merely negatives the idea there was any partial payment of it.

Mr. Davis: But you are not alleging that it was unconditional payment?

Mr. George Wm. Neuner: We allege it as payment. Payment is payment, Roland.

Mr. Davis: I see what you mean. Now there was this one other question. I probably should know the answer to this but I don't. In view of the admitted facts of the case, how far is the Court going to permit the parties to go into all of the questions?

The Court: Well, that comes up in connection with our pre- [7] trial procedure every now and then. I had a case the other day which ordinarily would have taken a week, I would say, before it unfolded itself in the old way of doing it, just going out and starting to try a case, but we had 125 or more exhibits in it, as I remember, and we got through in a day and a half. The case resulted in a directed verdict. But I can see some of the difficulties that the plaintiff had in that case. We had taken so many facts out of the case there was little local color left for him. And I imagine that is what

you have in mind here, whether we are going to have a recital from the witness stand by the widow of the death of her husband and the background of this thing. Isn't that what you——

Mr. Davis: Yes. Those are the things I have in mind.

The Court: ——what you had in mind?

Mr. Davis: As to what we are going to do, because I take it that these admitted facts are part of the case and the purpose of the pre-trial order is to avoid unnecessary proof.

The Court: Now as we went along in that case I took the play away from the plaintiff's lawyer, if I could put it that way, and would say to him, "Now that is admitted", and delineate it to the jury, that at previous meetings, before they were called, certain facts had been admitted.

Mr. Neuner: There is no desire, I might say, on my part, to go into any extended detail. I think there are some questions there that probably a jury would want to know about, [8] but not to rehash all the admitted facts.

Mr. Davis: It seems to me under the admitted facts there is very little testimony to be taken.

Mr. Neuner: Well, there are a few things that I think would enlighten the matter. For instance, I raised the question at pre-trial, I am going to ask her what her husband told her about this insurance.

Mr. Davis: Of course you understand there will be an objection.

Mr. Neuner: Of course I expect that; I would be surprised if there wasn't; but that goes to the question of intention and good faith. It has nothing to do probably with the technical propositions that——

The Court: What answer do you expect from her? I remember that was mentioned at pre-trial, but what will she say?

Mr. Neuner: I expect her to say that he told her that he had paid the insurance; that he had given a note for little Warren's insurance and some parley took place which may not be material, and she asked him why——

The Court: Why what?

Mr. Neuner: He gave a note. He said he wanted to be sure that their insurance was kept in force.

Mr. Davis: You mean the children's?

Mr. Neuner: No; this insurance.

Mr. Davis: He didn't say that he gave a note to pay this? [9]

Mr. Neuner: No; he gave a note for little Warren's but he gave the check. From the layman's attitude you can readily understand why he would make a statement of that kind.

The Court: When did he tell her that? That night?

Mr. Neuner: I think it was either that day or the next day.

The Court: How did it come up? Does she remember who brought it up?

Mr. Neuner: Well, the soliciting agent on the 13th came to the house——

The Court: Is that the day he gave the check?

Mr. Neuner: Yes.

The Court: Before he went out in the field he came by the house?

Mr. Neuner: And asked for Warren.

The Court: Asked for the deceased?

Mr. Neuner: No. He asked for—yes, the deceased, and she told him he was plowing over in an adjoining place, and he went over there, and I assume that naturally when he came in that night or the next morning something was said about that, and that is when he made this statement.

The Court: What is your authority for the admissibility of that? I remember we discussed that.

Mr. Neuner: My authority is that it is a verbal act showing intention as to what the deceased did, or intended to do—in this case what he did—and it is an exception to the hearsay [10] rule. It was first approved by our Supreme Court in *State v. Farnam*; it was next approved in this celebrated——

The Court: *Brumfield* case?

Mr. Neuner: No, no.

Mr. Davis: *McCredie*?

Mr. Neuner: Yes; the *Wigfall* case.

Mr. Davis: That wasn't such a conversation as this. That conversation related to the cause of his death, and that is the exception in the hearsay rule.

Mr. Neuner: Well, so is this. It is also in *New*

York Life Insurance Company v. Mason, in 272 Fed. 28. It goes along the line of verbal acts, intention, and Wigmore lays it down as an exception to the hearsay rule.

The Court: 272 Fed. 28, and Wigmore is where? Have you got your citation?

Mr. Neuner: No, I haven't got it to Wigmore, but they all base it on Wigmore; 82 Oregon 211.

Mr. George W. Neuner: Wigmore is set out in the Farnam case. I believe it is.

Mr. Huntington: What is that, 82 Oregon, the Farnam case?

Mr. Neuner: Yes.

The Court: What is the Wigfall case?

Mr. Neuner: I think Security Savings & Trust Company v. Commercial Casualty Insurance, 147 Ore. 195.

The Court: Is that the Wigfall-McCredie case?

[11]

Mr. Neuner: Yes, that is it.

The Court: What do you claim is the distinction?

Mr. Davis: I haven't read those other cases, but the Wigfall case involves the question of the cause of his death, and that is the exception to the hearsay rule and it is provided by the Oregon statute.

The Court: What does the Oregon statute say?

Mr. Davis: That the dying declaration is admissible as to the cause of death. And the whole question in the McCredie case, and in one case prior to that, was whether or not the exception would

be extended to civil cases. Prior to that time it had only been permitted in criminal cases, such as probably your Farnam case. I don't know what the Farnam case is.

Mr. Neuner: The Farnam case was the pioneer in that.

Mr. Davis: But it does not extend it to other civil matters or matters not connected with the death. That is my understanding of it.

Mr. Neuner: No. It is an exception to the hearsay rule and it has nothing to do with dying declarations.

The Court: What is the exception?

Mr. Neuner: In the Farnam case, of course that was a criminal case, the question came up in this way: There were two witnesses that were visiting with the deceased on the afternoon prior to her death. These two girls wanted the deceased to go home with them that night. [12]

Mr. Davis: I remember that case.

Mr. Neuner: She says, "Wait until the mail comes." They waited. The mail came along, the mail carrier handed her a note, she tore it up, and she says, "No, I can't go, girls. Roy is coming down tonight." Now there was the question. It wasn't a dying declaration because there was no impending death at that time.

The Court: Go get me that section of Wigmore.

Mr. Neuner: I think it is 1702 or 1736, I don't know.

The Court: The last edition.

Mr. Neuner: And of course they believed that. Judge Skipworth, in the first murder case that he tried, said he was inclined to sustain the objection. Mr. Rice and I maintained it was a very important piece of testimony and that we would like to be heard. We took up the rest of the afternoon and the next day, and the judge came out and overruled the objection.

Mr. Davis: Didn't they permit that on the basis of the question of her intent to go to a certain place?

Mr. Neuner: Well, it showed the mental attitude, the plan, the intention.

Mr. Huntington: As to something that happened in the future?

Mr. Neuner: Yes, but I don't think that makes any difference.

Mr. Huntington: Well, that distinguishes it against a declaration in his own interest. [13]

Mr. Neuner: Oh, no. We have authorities in there; if the Court wants to take up the time we will get them.

The Court: We will have to take it up sooner or later and we will be right up to it about your first witness, I would think, and it is an important question. If it is inadmissible and was so held by the Circuit, should you get a verdict, it is very important to you, and it is important to me as a matter of principle.

Mr. Neuner: Yes. Well, I want the Court to understand if I am wrong I don't want to urge anything that is not right.

Mr. Davis: You claim, even if this is admissible, it establishes his intent to what?

Mr. Neuner: To honestly believe that his premiums had been paid on these policies and the policies were in full force and effect.

Mr. Davis: Well, I don't think it goes any further than to say that he gave a check in payment of it.

Mr. Neuner: That is true. I don't claim they were—that that spells that the money was received on the check.

Mr. Davis: I think that is the only thing that the statement would be worth, and certainly it would be a self-serving declaration.

Mr. Neuner: No.

Mr. Huntington: It is admitted that he gave the check. You don't need to prove that. [14]

Mr. Davis: That is all it is. But it is alleged he gave the check and it is admitted.

Mr. George W. Neuner: I have two places on that, your Honor.

The Court: Just write it down.

Mr. Neuner: It resolves itself back to the same question—he gave the check, and that he intended to pay his premiums. Now that is the whole sum and substance of it.

Mr. Davis: Of course if a man gives a check for the amount of the premiums to the company, it is apparent that he gave that check with that intent, but still the law comes back that a check is not absolute payment. It is taken conditional upon the

check being honored when presented. So you have got to go further than that, it seems to me, if you are going to rely upon anything that he said or did to show more than that he just actually handed the check over.

Mr. Neumer: That is all——

Mr. Davis: And that is all this conversation amounts to.

Mr. Neumer: That is all we can show, that he intended to pay his premium and that he gave his check in payment of it.

The Court: I don't know whether it will be practicable from the evidence but it will help me to inject this into the discussion. I assume from what I have heard of this case this man thought he had money in the bank all the time to cover that?

Mr. Neumer: Surely. [15]

The Court: As I remember his check stubs, they showed he had an amount of balance to his credit.

Mr. Davis: We are not going to agree that check stub is correct or was made out by him, or was made out then.

The Court: I am glad to have your statement on this.

Mr. Davis: We are not going to agree to that. Now this is outside of the record, but we do know that this man has had a habit of giving NSF checks, and anybody that does that quite often you can't say that he thought he had money in the bank to meet the check when the check was drawn.

The Court: And as long as you have made the

point, you question that those check stubs are in his handwriting?

Mr. Davis: Yes, I question that, and I question when the entries were made. We haven't anything on that at all.

The Court: Do you expect to offer the check stubs?

Mr. Neuner: Yes. Your Honor will recall that he wanted to see them and so I put them in.

The Court: Yes, they are identified but they are not in the case yet.

Mr. Neuner: No. We intend to introduce them.

The Court: You intend to introduce them?

Mr. Neuner: That goes to the question, your Honor, again, of good faith and that he intended to have the money there.

The Court: I will tell you how my mind is running: that this is not a good faith case, as I see it; it is a contract [16] case, and it takes two parties to make a contract, and you claim payment by acceptance of the check?

Mr. Neuner: Yes.

The Court: Well, if that question goes to the jury, just as that old Chicago judge instructed, I don't see how what he said could be improved on; I don't know whether he is old either—Miller had to think he was giving the check in payment, and the company by its conduct, at least—you don't have to claim any express understanding on their part—had to so conduct itself as to warrant the inference that it thought and intended that it was accepting

the check in payment. Now then, so far as Miller's part in it is concerned, that conduct seems to me is material. Naturally if Mr. Davis could show that those entries were not made in his handwriting and were made by somebody else afterwards in order to prepare for this case, then that is another story.

Mr. Davis: We don't know that they are made in somebody else's handwriting. We are not claiming that.

Mr. Neuner: What do you claim for that? Fraud?

Mr. Davis: No.

The Court: He just says he doesn't know.

Mr. Davis: We don't know.

The Court: He is not going to admit the signature, or that the writing was made at the time.

Mr. Neuner: You can't put me on the stand and have me swear [17] it was his handwriting. I don't know.

The Court: His wife knows.

Mr. Neuner: Yes, his wife knows.

Mr. Davis: Does she know when those entries were made?

Mr. Neuner: No. I don't know.

Mr. Davis: I think, to be admissible, those entries would have to have been made there at the time it occurred.

Mr. Neuner: I don't think so.

The Court: You would have to prove they were in his handwriting, however.

Mr. Neuner: Oh, yes, we would have to prove that.

The Court: You haven't inquired of her as to that?

Mr. Neuner: No. As I say, I don't consider that important.

Mr. Davis: Our position there is, of course, it doesn't make a bit of difference what he intended or thought; even though he thought he had money in the bank, it was his duty to have money in the bank when this check was presented, and sufficient money in the bank to honor the check.

Mr. Neuner: Well, of course that is disputable—his duty to have it there. Of course his honor would imply that he would have it there when he gave the check. But the presumption that obtains is the money wasn't in the bank.

Mr. Davis: But it wasn't there when the check got there.

Mr. Neuner: That is right.

Mr. Davis: And that is the reason that the law is that a [18] check is taken only conditionally—

Mr. Neuner: Oh, no; not a post dated check. You are right as to a currently dated check.

Mr. Davis: Even under the Oregon law a note is not unconditional payment; that is conditional; and unless the note is paid at maturity the original debt is not paid.

The Court: We have gone all over that before, and I suppose I will have to face that on the instructions, or on some phase of the case—these questions you are discussing now. Now on this question of his statement made and how many hours after he

saw this fellow in the field, that was in the early afternoon this man went out in the field, wasn't it?

Mr. Neuner: Yes; between one and two o'clock.

The Court: You are not sure as to when she claims he made this statement to her; probably at the earliest when he came in for supper?

Mr. Neuner: That would be about it.

The Court: And I see another difficulty about that, I think, that warrants consideration; permitting her to relate his statement that he had paid the premium. Now I know that is the way the ordinary man would put it, of course, that "I paid the premium", when he gave a note; but that is so much an ultimate fact which is for the jury in the case I think there is some real danger in throwing a statement like that into the case. I will rule on it of course if you put it up to me, but I don't [19] want her to get on there blurting out something that the Circuit may say, as they do in the war risk cases, was for the jury to decide. This Circuit has been particularly severe about permitting a statement before a jury in the nature of——

Mr. Neuner: Invading the province of the jury?

The Court: That is right. I myself am a rebel about the restrictive rules of evidence but I haven't had any luck with this Circuit.

Mr. Neuner: As I say, the only question we contend for that, and we limit it to that, was the intention.

The Court: I think if that widow testified when he came in that night he told her that he had given

this man, this agent a note for the little one's insurance, the new policy, and he had given him a check for the premium on the other one, in the first place I don't see that it adds anything to the case from your point of view. It is an admitted fact that he gave this man a check and that he gave him a note. But I think if she goes on there and says when he came in that night he told her he had paid the premiums on the two outstanding policies, or the older policies, that he had paid them by giving a check, I think a serious question is presented.

Mr. Neuner: I don't know whether he said by check. I think he said, "I paid that and I gave them a note on the other."

The Court: Well, I will ask you not to raise that question with her until I have ample time to look it up and look over [20] the authorities today anyhow.

Mr. Davis: That is going to be probably one of his first witnesses, isn't it?

The Court: I just asked him to be sure not to ask her that question.

Mr. Davis: With the opening statements probably we won't get to it this forenoon.

The Court: I want the noon hour to think of it and I want to fix my mind. You will expect the answer, if you ask the question, either that he paid it or paid it by giving a check?

Mr. Neuner: Yes, sir.

The Court: One or the other?

Mr. Neuner: Yes.

The Court: Stay away from that until after the noon hour, so I will have the noon hour to look into

it. Did you have some authorities you wanted me to put down on that? I have just written their cases here on that.

Mr. Neuner: To submit my case I will have to call some attorneys as to attorneys' fees, unless we agree on it.

The Court: Suppose you discuss that later. We can use the time now to better advantage. Let me tell you something now, before you leave this evidence question. We have also a statute that is presented to us here quite often that a deceased's statements are admissible on any question raised against him or his estate by an adversary. [21]

Mr. Huntington: In a case where his administrator is a party.

The Court: You are correct.

Mr. Huntington: And that does not apply in this case.

The Court: You are correct. It is limited just as you say.

Mr. Huntington: Yes.

The Court: There is considerable discussion of that by Wigmore.

(After further discussion in re authorities, etc., the Court, counsel and the court reporter returned to the court room, and thereupon the following proceedings were had:)

A jury was empaneled and sworn, and an opening statement was made by Mr. George Neuner in behalf of the plaintiffs.

The Court: Since it so near noon I won't ask Mr. Davis to break his statement. I will put off his statement until after the recess. Gentlemen of the jury, kindly, as in all cases, do not discuss the case among yourselves, nor permit it to be discussed in your presence until it is finally submitted. If you will please come back at one thirty we will proceed with the case.

(Thereupon at 11:53 o'clock A. M. a recess was taken until 1:30 o'clock P. M. of this day, Tuesday, January 20, 1942, at which time Court reconvened pursuant to the recess and the following further proceedings were had herein:)

An opening statement was made by Mr. Davis in behalf [22] of the defendant, and thereupon evidence was given as follows:

PLAINTIFFS' EVIDENCE

R. A. DURHAM

was produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: May I have your correct name for the reporter?

The Witness: R. A. Durham.

Mr. Neuner: We are calling Mr. Durham, your Honor, as an adverse witness.

(Testimony of R. A. Durham.)

By Mr. Neuner:

Q. You are the cashier of the New York Life Insurance Company? A. Yes, sir.

Q. How long have you been in that capacity?

A. I have been cashier here in Portland about nineteen years.

Q. In charge of the branch office?

A. How?

Q. In charge of the branch office of the New York Life Insurance Company?

A. Well, in charge of the part that the cashier is in charge of; that is the clerical force.

Q. I wish you would just briefly narrate to the jury what the duties of the cashier are in connection with the office.

A. Well, I have charge of the office force. Our work is to collect premiums and transact different matters that come up with [23] policyholders and with our agents.

Q. Do you have in your possession the official premium receipts?

A. They are in the office.

Q. You are the custodian of them?

A. Well, there is about nineteen people in the office there under me. I don't personally handle those receipts.

Q. Well, they are issued by you, are they not, when premiums are paid?

A. Well, I am responsible for them.

(Testimony of R. A. Durham.)

Q. And when a premium is paid what do you do with reference to the official receipt.

A. When the premium is paid the clerk who takes the money signs the receipt and gives it to the person who pays it.

Q. And the clerk that does that is under your immediate direction? A. Yes.

Q. And this, I understand it, this procedure is common and generally followed; that is, immediately upon a premium payment a receipt is issued?

A. Yes. We have a great many transactions every day, people coming in there and paying their premiums.

Q. And you receive some by mail, do you?

A. Yes. We probably receive more remittances in the mail than we do right in the office.

Q. Generally by check?

A. Mostly by check or money order, I don't know which. [24]

Q. And on receipt of these checks the official receipt is immediately mailed?

A. Well, if the premium is paid in full and everything is all right about it.

Q. Well, what I am getting at is this: Now if I send you my check in payment of a premium you receive that check tomorrow, you mail that receipt, or do you wait until the check is returned to see whether it is good or not before you issue the official receipt?

(Testimony of R. A. Durham.)

A. No, we don't wait to find out if this check is good before we mail the receipt. If we received a remittance from somebody today we might not get at that maybe until the next day.

Q. I know. Well, that is what I meant.

A. In due course.

Q. Yes.

A. It depends on how much work there is.

Q. But the general policy is that on receipt of the check the receipt goes forward in acknowledgment thereof?

A. Yes; if the premium is paid within the grace period and is paid in full.

Q. Were you acquainted with Warren L. Miller during his lifetime? A. I don't believe so.

Mr. Neuner: May I have these exhibits, please.

Q. Do you know whether Warren L. Miller had a policy with your company? [25]

A. I am satisfied he did.

Q. Well, I hand you herewith the two life insurance policies, being Plaintiffs' Pre-Trial Exhibits 1 and 2, and ask you to peruse them and state whether or not you know what they are.

Mr. Davis: If the Court please, I think this is for the purpose of identifying and admitting these policies. These have all been identified in the pre-trial order. I don't think it is necessary to go through all this procedure.

The Court: You admit that those are the policies?

(Testimony of R. A. Durham.)

Mr. Davis: We have admitted that in the pre-trial order.

The Court: I understand.

Mr. Davis: We have no objection to their introduction.

The Court: You have to communicate this information to the jury, so I am employing this device now. It is admitted, gentlemen of the jury, that these are the policies which were issued by the defendant company on the life of the deceased, the policies here in controversy in this case. They are admitted—you are offering them, Mr. Neuner?

Mr. Neuner: Yes.

The Court: They are admitted and will be given the same numbers as at pre-trial.

(The New York Life Insurance Company Policy No. 17,395,774 in the amount of \$3,000, issued to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' [26] Pre-Trial Exhibit 1, was further marked "and trial"; and the New York Life Insurance Company Policy No. 17,395,775 in the amount of \$2,000, issued to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 2, was further marked "and trial".)

(Testimony of R. A. Durham.)

PLAINTIFFS' EXHIBIT No. 1

(Copy)

NEW YORK LIFE INSURANCE
COMPANY

A Mutual Company Founded in 1845 Agrees to Pay to Reta D., wife of the insured, or in event of her death, to Warren D. and Marcia M. Miller, children of the insured or to such of them as shall be surviving as the benefits hereunder severally become due and payable, share and share alike * * * Beneficiary (with right on the part of the insured to change the beneficiary in the manner provided herein) Three Thousand Dollars (the face of this policy) As Hereinafter Provided upon receipt of due proof, on forms prescribed by the Company, of the death of Warren L. Miller the Insured And, if such death occurs on or before the Seventeenth day of July 1954,

The Company Further Agrees to Pay to Said Beneficiary a Monthly Income of Thirty Dollars beginning as of the date of death of the Insured and terminating on the last Monthly Income date prior to the Eighteenth day of July 1954.

If due proof of the death of the Insured is received on or before the Seventeenth day of July 1954, the face amount of this Policy will be payable upon said date. If such proof is received after said date the face amount will be payable upon receipt thereof.

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

This contract is made in consideration of the application therefor and of the payment in advance of the sum of \$28.62, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Seventeenth day of October Nineteen Hundred and thirty-nine, and of a like sum on said date and every Three calendar months thereafter during the lifetime of the Insured until premiums for Fifteen full years shall have been paid, and of the payment of a reduced premium of \$24.96 every Three calendar months thereafter during the lifetime of the Insured.

This Policy shall take effect as of the Seventeenth day of July Nineteen Hundred and thirty-nine, which day is the anniversary of this Policy.

The Benefits and Provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Thirteenth day of July Nineteen Hundred and thirty-nine.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON,

Secretary

D. D. LURIE

Registrar

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

939-92 Fam. Inc. (15) O. L.

Age 33.

Examined JM cp

MB

Family Income—15 Year Period. Face Amount Payable at Death if Death occurs after the 15th Anniversary of this Policy; if Death occurs prior thereto, Monthly Income from Death to the 15th Anniversary of this Policy, when Face Amount is Payable. Premiums Payable during Lifetime unless Dividends Applied to Shorten Premium Paying Period. Premiums reduced at the 15th Anniversary. Annual Participation in Surplus. Disability Benefit, Accidental Death Benefit.

ACCIDENTAL DEATH BENEFIT

This Agreement is issued as a part of and attached to Policy No. 17 395 774 on the life of Warren L. Miller the Insured.

In Consideration of the payment in advance of an additional Quarter annual premium of \$1.98, which is included in and payable as part of the premium stated in said Policy and of the payment of a like sum as part of each premium after the first payable under said Policy,

New York Life Insurance Company Agrees to Pay to the beneficiary under said Policy, Three Thousand Dollars upon receipt of due proof, on forms prescribed by the Company, that the death of the Insured resulted directly and independently

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury and prior to the anniversary of said Policy on which the Insured's age at nearest birthday is 65 and prior to the maturity of said Policy; provided, however, that such Accidental Death Benefit shall not be payable if the Insured's death resulted, directly or indirectly, from (a) self-destruction, whether sane or insane; (b) the taking of poison or inhaling of gas, whether voluntary or otherwise; (c) committing an assault or felony; (d) war or any act incident thereto; (e) engaging in riot or insurrection; (f) operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports; (g) infirmity of mind or body; (h) illness or disease; or, (i) any bacterial infection other than that occurring in consequence of an injury on the exterior of the body effected solely through external, violent and accidental means.

The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

The Accidental Death Benefit shall not apply to any Temporary Insurance or Paid-up Insurance

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)
provided in said Policy under "Surrender Values"
or to any dividend additions provided therein under
"Participation in Surplus—Dividends."

Any premium due on or after the anniversary
of said policy on which the * * * age of the In-
sured at nearest birthday is 65 will be reduced by
the amount of premium included therein for the
Accidental Death Benefit. If for any reason said
reduction shall not be made and said amount shall
be paid to and received by the Company as a part
of any such premium, the amount overpaid with
interest at five per cent per annum thereon, will
be refunded and the Company shall not incur any
other or further obligation or liability.

Upon written request of the Insured on any an-
niversary of said Policy and upon return of said
Policy and this Agreement for proper indorse-
ment, the Company will terminate this Agreement
and thereafter the premium shall be reduced by
the amount included therein for the Accidental
Death Benefit.

This Agreement shall automatically terminate
if any premium under said Policy shall not be duly
paid or if said Policy shall be surrendered or ex-
changed.

The Benefits and Provisions contained in the
Sections "Miscellaneous Benefits" and "Other
Provisions" of said Policy shall also apply to this
Agreement, except as to the provisions of said
Policy with respect to "Residence, Travel and

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

Occupation" and "Incontestability" and except as to the above conditions under which said Accidental Death Benefit shall not be payable.

In Witness Whereof the New York Life Insurance Company has caused this Agreement to be signed this 13th day of July, 1939.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON,

Secretary

D. D. LURIE

Registrar

Examined JM MB

A. D. B. 938-218. F. I.-O. L.

cp

17-395-774

17-395-775

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY—Part I.

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full amount of the first premium for the insurance applied for in Questions 2 and 3 and so

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

declares in this application and receives from the soliciting agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application form is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

that neither one of them is authorized to accept risks or to pass upon insurability.

Dated at McMinnville, Ore., this 8 day of July, 1939.

Witnessed by

A. E. YOUNTS,
Soliciting Agent.

Signature of the person applying for insurance:
WARREN L. MILLER.

17-395-774

17-395-775

Application to the New York Life Insurance
Company—PART II

Answers to the Medical Examiner

This examination must be made in private; no agent or third person being present.

Notice to Medical Examiner: Use only black ink.
This examination is to be photographed.

Do Not Use Dashes or Ditto Marks in Answering Questions.

1. A. What is your occupation? (Full details.)

A. Dairyman

B. How long have you been engaged in your present occupation?

B. 8 yr

C. What was your previous occupation?

C. Grocer

D. Have you ever changed your occupation or place of residence on account of your health? (If so, give full details.)

D. No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

2. Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so, give full details.)
No.
3. A. How many aerial flights have you taken and when last?
A. None
B. How many aerial flights have you taken within the last year?
B. 0
C. State whether as passenger or pilot and whether you are a Reservist.
C. None
D. Do you contemplate participation in aeronautics? (If so, in what capacity.)
D. No
4. In what States have you lived the last ten years, and which years in each?
(If outside the U. S., in what countries, and which years in each.)
Ore 10
5. A. How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants?
A. Yes—3 glass beer per wk.
B. How frequently, if at all, and in what quantity have you drunk any of them in the past?
B. Same

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

C. Have you within the last five years drunk any of them to excess?

C. No

D. Do you now take or have you ever taken morphine, cocaine, or any other habit forming drugs?

D. No.

6. A. Have you now pending any other application for insurance on your life or for the reinstatement of insurance?

"Yes" or "No"—No

B. Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance?

"Yes" or "No"—No

C. Have you ever been declined for life insurance or for the reinstatement of life insurance?

"Yes" or "No"—No

D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?

"Yes" or "No"—No

7. A. Have you ever had any accident or injury or undergone any surgical operation?

"Yes" or "No"—Yes

If the answer to any query is "Yes" give Date, Details and Results and, if within five years, name and address of every Physician or Practitioner consulted.

Appendectomy 1924—Perfect recovery

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium?

“Yes” or “No”—No

C. Has albumin or sugar ever been found in your urine?

“Yes” or “No”—No

D. Have you ever been found to have a high blood pressure?

“Yes” or “No”—No

E. Have you ever raised or spat blood?

“Yes” or “No”—No

F. Have you gained or lost in weight in the last year?

“Yes” or “No”—Yes

Gain? No. Loss? \neq 10. Cause? hard work

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

A. The Brain or Nervous System?

“Yes” or “No”—No

B. The Heart, Blood Vessels or Lungs?

“Yes” or “No”—No

C. The Stomach or Intestines, Liver, Kidneys or Bladder?

“Yes” or “No”—No

D. The Skin, Middle Ear or Eyes?

“Yes” or “No”—No

9. Have you ever had Rheumatism, Gout or Syphilis?

“Yes” or “No”—No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?

“Yes” or “No”—No.

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?

Name and Address (If none, say none)—Dr. Manning.

Date—1939.

Reason for Consultation, Examination or Treatment and Results—Health Card.

12. Family Record—Age if Living—Condition of Health, if not good, give full details.

Father, 61, good.

Mother, 60, good.

Brothers—1—37, good.

Sisters—1—40, good.

13. A. Is any person in your immediate household now ill with consumption? (If so, state who and what precautions are being taken.)—No.

B. Has any person in your immediate household suffered from or died of that disease within the past year?—No.

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 7 day of July 1939

Witnessed by

CHAS. L. WILLIAMS, M. D.,
Medical Examiner.

933-10. Oct., 1936

Signature of the person applying for insurance

WARREN L. MILLER

[Printer's Note: Other portions of Plaintiff's Exhibit 1 are set out in the Answer to Amended Complaint.]

[Endorsed]: Filed Jan. 21, 1942.

PLAINTIFFS' EXHIBIT No. 2

(Copy)

NEW YORK LIFE INSURANCE
COMPANY

A Mutual Company founded in 1845 agrees to pay to Reta D., wife of the insured, or in event of

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

her death, to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits hereunder severally become due and payable, share and share alike * * * Beneficiary (with right on the part of the insured to change the Beneficiary in the manner provided herein) Two Thousand Dollars (the face of this policy) As Hereinafter Provided upon receipt of due proof, on forms prescribed by the Company, of the death of Warren L. Miller, the Insured, and, if such death occurs on or before the Seventeenth day of July, 1959,

The Company further agrees to pay to said Beneficiary a monthly income of Twenty Dollars beginning as of the date of death of the Insured and terminating on the last Monthly Income date prior to the Eighteenth day of July, 1959.

If due proof of the death of the Insured is received on or before the Seventeenth day of July, 1959, the face amount of this Policy will be payable upon said date. If such proof is received after said date the face amount will be payable upon receipt thereof.

And the Company agrees to pay to Said Beneficiary an additional amount of Two Thousand Dollars, upon receipt of due proof that the death of the Insured resulted, before the anniversary of this Policy on which the Insured's age at nearest birthday is 65, from accidental means as defined in and sub-

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

ject to the provisions set forth under "Accidental Death Benefit."

And the Company agrees to waive payment of premiums, upon receipt of due proof that the Insured is totally and presumably permanently disabled before the anniversary of this Policy on which the Insured's age at nearest birthday is 60, as provided under "Waiver of Premiums in event of Total and Permanent Disability."

Family Income—20 Year Period. Face Amount Payable at Death if Death occurs after the 20th Anniversary of this Policy; if Death occurs prior thereto, Monthly Income from Death to the 20th Anniversary of this Policy, when Face Amount is Payable. Premiums Payable during Lifetime unless Dividends Applied to Shorten Premium Paying Period. Premiums reduced at the 20th Anniversary. Waiver of Premium Disability Benefit. Accidental Death Benefit. Annual Participation in Surplus.

939-58

Fam. Inc. (20)

O. L.

D.-A. D. B.

Age 33.

Examined J. M.

MB cp

This contract is made in consideration of the application therefor and of the payment in advance

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

of the sum of \$20.10, (including \$1.44 for the Disability Benefit), the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Seventeenth day of October Nineteen Hundred and thirty-nine, and of a like sum on said date and every Three calendar months thereafter during the lifetime of the Insured until premiums for Twenty full years shall have been paid, and of the payment of a reduced premium of \$16.64 (including \$1.28 for the Disability Benefit) every Three calendar months thereafter during the lifetime of the Insured, subject to any reduction of the premium as provided under "Waiver of Premiums in event of Total and Permanent Disability."

(The above premiums include \$1.32 for the Accidental Death Benefit.)

This Policy shall take effect as of the Seventeenth day of July, Nineteen Hundred and thirty-nine, which day is the anniversary of this Policy.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Twenty-ninth day of February Nineteen Hundred and forty.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON

Secretary

D. D. LURIE

Registrar

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

17-395-774

17-395-775

APPLICATION TO THE NEW YORK LIFE
INSURANCE COMPANY—Part I.

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full amount of the first premium for the insurance applied for in Questions 2 and 3 and so declares in this application and receives from the soliciting agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That the soliciting agent is not authorized to collect any

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application form is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability.

Dated at McMinnville, Ore., this 8 day of July, 1939.

Witnessed by

A. E. YOUNTS,

Soliciting Agent.

Signature of the person applying for insurance:

WARREN L. MILLER.

17-395-774

17-395-775

Application to the New York Life Insurance
Company—PART II

Answers to the Medical Examiner

This examination must be made in private; no agent or third person being present.

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

Notice to Medical Examiner: Use only black ink.
This examination is to be photographed.

Do Not Use Dashes or Ditto Marks in Answering Questions.

1. A. What is your occupation? (Full details.)
 - A. Dairyman
 - B. How long have you been engaged in your present occupation?
 - B. 8 yr
 - C. What was your previous occupation?
 - C. Grocer
 - D. Have you ever changed your occupation or place of residence on account of your health?
 - (If so, give full details.)
 - D. No
2. Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so, give full details.) No
3. A. How many aerial flights have you taken and when last?
 - A. None
 - B. How many aerial flights have you taken within the last year?
 - B. 0
 - C. State whether as passenger or pilot and whether you are a Reservist
 - C. None
 - D. Do you contemplate participation in aeronautics? (If so, in what capacity.)
 - D. No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

4. In what States have you lived the last ten years, and which years in each?

(If outside the U. S., in what countries, and which years in each.)

Ore 10

5. A. How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants?

A. Yes—3 glass beer per wk

B. How frequently, if at all, and in what quantity have you drunk any of them in the past?

B. Same

C. Have you within the last five years drunk any of them to excess?

C. No

D. Do you now take or have you ever taken morphine, cocaine, or any other habit forming drugs?

D. No.

6. A. Have you now pending any other application for insurance on your life or for the reinstatement of insurance?

"Yes" or "No"—No

B. Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance?

"Yes" or "No"—No

C. Have you ever been declined for life insurance or for the reinstatement of life insurance?

"Yes" or "No"—No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?

"Yes" or "No"—No

7. A. Have you ever had any accident or injury or undergone any surgical operation?

"Yes" or "No"—Yes

If the answer to any query is "Yes" give Date, Details and Results and, if within five years, name and address of every Physician or Practitioner consulted.

Appendectomy 1924—Perfect recovery

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium?

"Yes" or "No"—No

C. Has albumin or sugar ever been found in your urine?

"Yes" or "No"—No

D. Have you ever been found to have a high blood pressure?

"Yes" or "No"—No

E. Have you ever raised or spat blood?

"Yes" or "No"—No

F. Have you gained or lost in weight in the last year?

"Yes" or "No"—Yes

Gain? No. Loss? #10. Cause? hard work

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

A. The Brain or Nervous System?

“Yes” or “No”—No

B. The Heart, Blood Vessels or Lungs?

“Yes” or “No”—No

C. The Stomach or Intestines, Liver, Kidneys or Bladder?

“Yes” or “No”—No

D. The Skin, Middle Ear or Eyes?

“Yes” or “No”—No

9. Have you ever had Rheumatism, Gout or Syphilis?

“Yes” or “No”—No

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?

“Yes” or “No”—No.

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?

Name and Address (If none, say none)—Dr. Manning.

Date—1939.

Reason for Consultation, Examination or Treatment and Results—Health Card.

12. Family Record—Age if Living—Condition of Health, if not good, give full details.

Father, 61, good.

Mother, 60, good.

Brothers—1—37, good.

Sisters—1—40, good.

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

13. A. Is any person in your immediate household now ill with consumption? (If so, state who and what precautions are being taken.)—No.
- B. Has any person in your immediate household suffered from or died of that disease within the past year?—No.

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 7 day of July 1939

Witnessed by

CHAS. L. WILLIAMS, M. D.,

Medical Examiner.

933-10. Oct., 1936

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

Signature of the person applying for insurance

WARREN L. MILLER

[Printer's Note: Other portions of Plaintiff's Exhibit 2 are set out in the Answer to Amended Complaint.]

[Endorsed]: Filed Jan. 21, 1942.

Mr. Neuner: Q. I hand you herewith Plaintiffs' Pre-Trial Exhibit No. 3 and ask you to state whether or not that is your signature, or a letter that emanated from your office?

A. This is the letter with which that—I didn't personally sign this letter but it was signed by one of the clerks in my office.

Q. Under your supervision?

A. Well, it is in the regular course of her work. It is a lady who signed this.

Q. Well, that is your name?

A. My name is signed on the typewriter, "R. A. Durham, Cashier, By" and then this other person personally signed the letter.

Mr. Neuner: All right. We will offer that letter in evidence.

The Court: It is admitted and may be marked.

(The letter dated November 26, 1940, R. A. Durham, Cashier, to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 3, was further marked "and trial".) [27]

(Testimony of R. A. Durham.)

PLAINTIFFS' EXHIBIT No. 3

New York Life Insurance Company

Oregon Branch Office

Public Service Building, 920 S. W. Sixth Ave.,
Portland, Ore.

B. M. Downie, Agency Director

Bernard A. Young, Agency Organizer

R. A. Durham, Cashier

Telephone ATwater { 3353
 3354
 3355
 3356

File NC

Nov. 26, 1940.

Mr. Warren L. Miller,

Gen. Del.,

McMinnville, Oregon

Re—Pols. # 17 395 774-5

Dear Sir:

It is necessary to inform you that the check tendered in payment of the premiums of \$28.62 and \$20.10 due Oct. 17, 1940 for the above numbered policies on your life, and of which the following is a copy:

(Testimony of R. A. Durham.)

96-67 The First National Bank 96-67
Of McMinnville

McMinnville, Ore. Nov. 17, 1940. No.....

Pay to the Order of New York Life Ins. Co., \$48.72.

Forty-eight and 72/100.....Dollars

L. A. MILLER & SON

By Warren L. Miller

was not honored when presented to the bank for payment, and has been returned to us. Because of this fact, the premium now stands unpaid.

Inasmuch as the grace period allowed for payment of the premium has expired, this policy has, by its terms become lapsed on the books of the Company.

We regret the necessity of returning the above described check, which is enclosed, and request that you return the Official Receipts given at the time the Company first received the check, using the enclosed stamped addressed envelope.

The Company urges you to immediately apply for the reinstatement of your policy, by filling in complete and accurate answers on the attached form of Personal Health Certificate. Be sure to sign and date the form, and also have it signed by a witness.

Please then return the form, accompanied by a remittance of \$49.07 (which includes interest to Nov. 29, on the past-due premiums) to this office, in order that if the evidence of insurability is found to be satisfactory to the Company, your policy may be promptly reinstated.

(Testimony of R. A. Durham.)

Very truly yours,

R. A. DURHAM,

Cashier

By N. CALHOUN,

NC:L

To Avoid Delays, Please Always Give Policy Number When Writing the Company.

[Endorsed]: Filed Jan. 21, 1942.

Mr. Neuner: I think counsel will waive the reading now at this time?

Mr. Davis: Yes. I want to see what your letter is.

Mr. Neuner: Well, that is November 26th.

Q. We will hand you Pre-Trial Exhibit No. 4, being a check, and ask you to state whether that is the check referred to in your letter, Plaintiffs' Pre-Trial Exhibit 3.

A. Yes, this is the check.

Mr. Neuner: We offer that in evidence, your Honor.

The Court: It is admitted.

(The canceled check dated November 17, 1940, on The First National Bank of McMinnville, payable to the order of New York Life Ins. Co. in the amount of \$48.72 and signed L. A. Miller & Son by Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-trial Exhibit 4, was further marked "and trial".)

Y

1940 No.

Forty Eight and $\frac{72}{100}$

5-111-36511

L. G. Miller & Son
 By Norman L. Miller

1. DISTRICT OF COLUMBIA

PLAINTIFFS
 DEFENDANT'S
PRE-TRIAL
and
EXHIBIT 4
 C# No. 119
 A. W. PERSON
 RABBIT

[illegible][illegible]

THE UNITED STATES OF AMERICA
4. PORTLAND OF - 2024-11

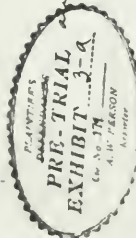
(Testimony of R. A. Durham.)

Mr. Neuner: And I might also offer the registered envelope, which is Plaintiffs' Pre-trial Exhibit 3-A, as part of the same transaction.

The Court: It is admitted.

(The registered envelope of Oregon Branch Office New York Life Insurance Company addressed to Mr. Warren L. Miller, so offered and received, having [28] been previously marked Plaintiffs' Pre-trial Exhibit 3-A, was further marked "and trial".)

IF NOT DELIVERED IN TIME DATE RETURN TO
OREGON BRANCH OFFICE
 NEW YORK LIFE INSURANCE COMPANY
 PUBLIC SERVICE BUILDING
 820 S. W. SIXTH AVENUE
 PORTLAND, OREGON

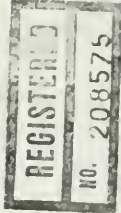


Registered

at local

Mr. Warren L. Miller,
 Gen. Del.,
 McMinnville, Oregon
 U. S. DISTRICT COURT
 DISTRICT OF OREGON

Return receipt requested



44421012

W. H. Marsh Lane

BY _____ DEPUTY



(Testimony of R. A. Durham.)

Mr. Neuner: Q. I likewise hand you Plaintiffs' Pre-trial Exhibit 8-a and ask you if that letter was prepared and mailed under your direction?

A. Yes.

The Court: Show it to Mr. Huntington, Mr. Bragg.

Mr. Davis: (After examining said letter) I understand you have offered this?

Mr. Neuner: Yes.

Mr. Davis: If the Court please, we object to the introduction of Plaintiffs' Pre-Trial Exhibit 8-a on the ground that this is something that occurred subsequent to the transaction, and which the plaintiffs claim constituted payment of the premiums on these policies. It has no bearing on the issues of the case.

The Court: Bring it to me, Mr. Bragg, please. (The Court peruses said letter.) It may go in.

(The letter dated December 2, 1940, R. A. Durham, Cashier, to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 8-a, was further marked "and trial".)

(Testimony of R. A. Durham.)

PLAINTIFF'S EXHIBIT No. 8-A

New York Life Insurance Company

Oregon Branch Office

Public Service Building, 920 S. W. Sixth Ave.,
Portland, Ore.

B. M. Downie, Agency Director

Bernard A. Young, Agency Organizer

R. A. Durham, Cashier

Telephone ATwater 3353

3354

3355

3356

File G

December 2, 1940

Mr. Warren L. Miller

General Delivery

McMinnville, Oregon

Re: Pols. # 17 395 774/5

Dear Mr. Miller:

We thank you for your letter of Nov. 28th to which was attached the money order of \$49.07, which we regret we must return herewith because you did not furnish us with the application for reinstatement as requested in our letter of November 26th when we returned the not-honored check.

In case the other has been misplaced, we are attaching another for you to complete and return with the money order of \$49.07. Be sure to answer all three questions, date the form and have your signature witnessed.

(Testimony of R. A. Durham.)

Upon receipt of same, the matter of reinstatement will be given prompt consideration.

Very truly yours,

R. A. DURHAM,

Cashier

By K. H. G.

KHG:vc

Inc.

To Avoid Delays, Please Always Give Policy Number When Writing the Company.

[Endorsed]: Filed Jan. 21, 1942.

Mr. Neuner: Q. I now hand you Plaintiffs' Pre-Trial Exhibit 8-c, being the money order referred to in your letter, [29] Pre-Trial Exhibit No. 8-a.

A. This may be the money order but I could not identify that because we have no endorsement on it. It is the same amount that is mentioned in that letter but I couldn't identify the money order.

Q. Did you receive a money order?

A. We did, yes. This is probably the one.

Mr. Neuner: All right. We offer it in evidence.

Mr. Davis: If the Court please, we don't object to it on the ground it is not the particular money order referred to, but we do object to it on the same grounds as the other objection stated to Plaintiffs' Pre-Trial Exhibit 8-a.

(Testimony of R. A. Durham.)

The Court: It will be admitted.

(The United States Postal Money Order dated November 28, 1940 payable to New York Life Ins. Company in the amount of \$49.07, remitter Mrs. Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 8-c, was further marked "and trial".)

50
40
30
25
20
15
10
5
1

51300
OFFICE NUMBER

McMinnville, Oreg.

312248

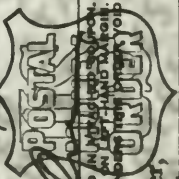
United States Postal Money Order

IDENTIFICATION REQUIRED

NOV 28 1940

SERIAL NUMBER
DOLLARS
CENTS

49 07



POSTMASTER AT

PAY AMOUNT STATED ABOVE TO ORDER OF PAYEE NAMED IN ORDER AND NOT GOOD FOR MORE THAN LARGEST AMOUNT INDICATED IN ORDER. ANY ALTERATION OR ERASURE HEREON MAKES ORDER VOID.

PAYEE OFFICE

Winifred Wiscarver,
Postmaster

RECEIVED TO PAYMENT

STAMP HERE

51300
OFFICE NUMBER

McMinnville, Oreg.

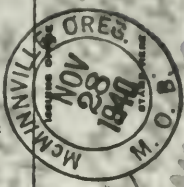
312248

Coupon for Paying Office
HOLDER MUST NOT DETACH

SERIAL NUMBER
DOLLARS
CENTS

49 07

PAY TO: WINIFRED WISCARVER FOR DOLLARS
CENTS
WINIFRED WISCARVER
Box 303



C.O.D. PARCEL NUMBER

PAYEE

TO TRANSFER OWNERSHIP THE PERSON IN WHOSE FAVOR THIS ORDER IS DRAWN MUST SIGN ON ABOVE

MORE THAN ONE ENDORSEMENT IS PROHIBITED BY LAW.

UPON PAYMENT OF A FEE OF THE SAME AMOUNT AS THAT CHARGED FOR THE ISSUE OF THE ORDER THE POSTMASTER AT ANY MONEY-ORDER POST OFFICE IN THE CONTINENTAL UNITED STATES, EXCEPT ALASKA, WILL PAY THIS MONEY ORDER IF PRESENTED WITHIN THIRTY DAYS FROM DATE OF ISSUE, ALTHOUGH DRAWN UPON ANOTHER POST OFFICE. PROVIDED THE ORDER WAS ISSUED AT AND DRAWN UPON A POST OFFICE IN THE CONTINENTAL UNITED STATES, EXCLUSIVE OF ALASKA.

IF NOT PRESENTED FOR PAYMENT BEFORE THE EXPIRATION OF ONE YEAR FROM THE LAST DAY OF THE MONTH IN WHICH ISSUED, AN ORDER BECOMES INVALID BY LAW, AND THE OWNER SHOULD PRESENT IT TO THE POSTMASTER AT A MONEY-ORDER OFFICE WHO WILL PROMPTLY FORWARD IT TO THE DEPARTMENT WITH AN APPLICATION FOR A WARRANT TO BE ISSUED IN FULL THEREOF FREE OF CHARGE.

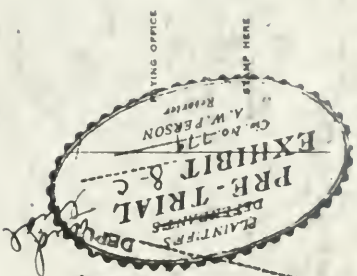
SEND THE ORDER AND COUPON TO THE PERSON TO WHOM THE MONEY IS TO BE PAID.
DO NOT MUTILATE THE ORDER OR COUPON OR DETACH THEM FROM EACH OTHER, OR ALTER THEM IN ANY WAY.

BANK STAMPS ARE NOT REGARDED AS ENDORSEMENTS

DISTRICT COURT
DISTRICT OF OREGON
FILED

JAN 21 1942

BANK STAMPS



(Testimony of R. A. Durham.)

Mr. Neuner: Q. Mr. Durham, when did you receive that check from the bank in return after you had deposited it?

A. According to our records it must have been on the 25th of November.

Q. What does the stamp on the reverse side allude to, "Endorsement canceled November 22, 1940"? [30]

A. I couldn't tell you. That is something put on there outside of our office.

Q. Is that your cancellation? A. No, sir.

Q. You endorsed this check, didn't you?

A. We have a rubber stamp endorsement on there.

Q. And you had authority to endorse "New York Life Ins. Co."? A. Yes, for deposit.

Q. For deposit. What do you mean by "for deposit"?

A. Well, I don't know whether you can read that endorsement or not. It tells it is to be credited to a certain account.

Q. Well, that is to the account of New York Life Insurance Company? A. Yes.

Q. And you say that you didn't—that this endorsement was not canceled in your office?

A. I think that was done at the bank.

Q. Now that endorsement was canceled on the 22nd; then where was this check from the 22nd to the 25th, when you got hold of it?

A. Well, I couldn't tell you.

(Testimony of R. A. Durham.)

The Court: What day was Thanksgiving, what day of the month?

Mr. Davis: The 21st.

The Court: The 25th was Monday?

Mr. Neuner: Now if this check had cleared——
[31]

The Court: Let's straighten our dates out. Thanksgiving was the 21st?

Mr. Neuner: I haven't looked it up, your Honor. I am willing to take counsel's word for it. They say they looked it up.

Mr. Davis: Thursday was the 21st.

The Court: What happened, as shown on the back of the check, on the 22nd, Mr. Neuner?

Mr. Neuner: The check shows on its face that the endorsement was canceled on November 22nd.

The Court: That would be Friday of the week?

Mr. George Wm. Neuner: That would be Friday.

The Court: Now you just asked Mr. Durham a question about the 25th. If he got the check on the 25th, was that the following Monday?

Mr. George Wm. Neuner: That was the following Monday, the 25th.

Mr. Neuner: Yes. The 22nd was Friday, 23rd, 24th; the 25th would be the following Monday.

The Court: So the jury may be able to follow this, the point of Mr. Neuner's question is that this check, after it was turned down out at McMinnville, came back to the bank in Portland, where Mr. Durham had deposited it, and the cancellation of en-

(Testimony of R. A. Durham.)

dorsement was made in the bank here in Portland on——

Mr. Neuner: The 22nd.

The Court: ——on Friday, the 22nd, the day after Thanksgiving, [32] and it didn't get to Mr. Durham's office until the following Monday; and, knowing banks as I do, I imagine it didn't get far away from the bank either.

Mr. Neuner: Q. Did you go after this check, or was it sent to the office?

A. They brought it up to the office.

Q. Who brought it up?

A. Some bank messenger.

Q. You send the checks down and the bank sends them back; is that the idea?

A. If the check is returned NSF, or for any reason, they usually send a messenger up to the office and we give them our check for it.

Q. And you gave your check on the 25th, you say?

A. Yes; I believe that is the date of the check. That is as I remember it.

Q. Yes. Now if this check had cleared and had been returned to your office on the 25th for the amount therein stated, then the Company would have accepted that in payment of the premiums, would it not?

A. I don't know whether I understand your question.

Q. The check would not have been returned, you would have gotten the money in lieu of it.

(Testimony of R. A. Durham.)

A. Well, when the check is not returned the transaction would have been closed. [33]

Q. Yes. As far as your company is concerned, if this had been paid any time after the 22nd, or otherwise, why, the transaction would have been closed?

Mr. Davis: If the Court please, we object to that question as argumentative. Also it calls for a conclusion of the witness.

Mr. Neuner: I don't think it calls for a conclusion of the witness, your Honor. The point I am trying to make is this: That they maintain here that they acted within the grace period, and it shows on the face of it that they didn't return it until three days after the grace period, then there was another three days before they got the check, and that is the reason I put that question. I claim nothing for it, as far as that goes, outside of that.

The Court: I sustain the objection.

Mr. Neuner: Q. Do you recall when this check came to your office? I believe it is agreed on the 13th; is that correct?

A. That is what our receipt shows, that we got it on the 13th.

Q. That is your record? A. Yes.

Q. You got the check on the 13th of November?

A. Yes.

Mr. Neuner: That is all.

Mr. Davis: There will be no cross examination.

(Witness excused.) [34]

Mr. Neuner: Call Mr. Yount.

A. E. YOUNT

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: May I have your correct name for the reporter?

The Witness: A. E. Yount.

By Mr. Neuner:

Q. Where do you reside, Mr. Yount?

A. I reside in Portland.

Q. How long have you resided here?

A. Twenty-one years.

Q. Just talk to the jury, please.

A. Yes, sir.

Q. And what is your business or occupation?

A. I am soliciting agent for the New York Life.

Q. And how long have you been employed in that capacity?

A. It will be sixteen years the first of March.

Q. And what territory do you cover?

A. Well, our license is allowed for any place in the State of Oregon.

Q. You speak of license; that is your license from the State of Oregon?

A. From the State of Oregon.

Q. Do you obtain that license, or is the company licensed? [35]

A. The company obtains the Oregon license.

Q. Now were you acquainted with Warren L.

(Testimony of A. E. Yount.)

Miller during his lifetime? A. Yes, sir.

Q. How long did you know him?

A. Somewhere between eighteen and twenty years.

Q. And were you both reared in the Yamhill country? A. No.

Q. You got acquainted there?

A. Got acquainted out there. I knew him when he was in grade school. I was a Y. M. C. A. secretary and he was in camp with me when he was in Bridgeport.

Q. I see. And was that relationship between you and Warren during that time of a close, intimate nature?

A. Friendly, yes; very good friendly relationship.

Q. Did you solicit Mr. Miller for these policies here? A. Yes, sir.

Q. And you were the soliciting agent that took those policies? A. Yes, sir.

Q. Collected the premiums?

A. Well, I was responsible for the first premium on the policy. The policy is billed to me and I am responsible for the first one but not for any after that.

Q. I see. Now during that time—this was July, I believe, 1939, when these policies were issued? [36]

A. Yes.

Q. How many times had you seen Warren L. Miller since that time? A. On July, 1939?

(Testimony of A. E. Yount.)

Q. Since that time, yes.

A. Well, I picked up a reinstatement of those policies in August at the Fair in Clackamas County. I may be wrong. I think it is the Clackamas County Fair at Canby. And I made arrangements for the deliverance or getting a policy for his son for the 13th day of November. Then I saw him probably——

The Court: You are talking about 1940 now? 1940?

A. Yes. I beg your pardon. Mr. Neuner, was that since '39?

Mr. Neuner: Since '39.

The Witness: Oh, I beg your pardon. I didn't get your question.

The Court: These policies were originally issued in July, '39?

A. Yes, sir; and I delivered the policies in July and I saw him, I should guess—I guess probably every six weeks or two months from that time on.

Mr. Neuner: Q. You spoke now of getting some reinstatement. Was that on these policies?

A. Yes, sir. That is the one in 1940. That was a reinstatement that I spoke of. I understood your question was from July, in '40, in place of '39.

Mr. Neuner: No. I asked '39. [37]

The Witness: I see.

Q. You had sold him some policies before that in the New York Life, hadn't you?

A. Yes, sir, I had.

(Testimony of A. E. Yount.)

Q. How many?

A. Three. I beg your pardon. I guess, two, perhaps. I think I had better correct that, because the amounts were the same, but these last two policies, the amount was the same but divided in two policies, and then there were—I would have to consult the record to be sure, but the policy issued in about '37, that was carried, I think kept in force perhaps six months. Now I am not certain that was issued in two policies or one, but the amount was the same. And then I had sold him a policy in perhaps '26 or '27 that had been kept in force some six or seven years.

The Court: This is all New York Life?

A. All New York Life, yes, sir.

The Court: Did he have insurance in any other company other than the New York Life?

A. He did. When I sold him the first policy he had a policy in another company.

Mr. Neuner: Q. He gave that up?

A. I never knew when he did. I was under the impression that that was in force.

Mr. Davis: If the Court please, it seems to me we are going [38] into a lot of entirely immaterial matter, not within the pleadings, not within the admitted facts, so far as we can see serves no purpose.

The Court: Well, I take it it is my fault for asking the question. Go ahead, Mr. Neuner. I am the one that raised it.

(Testimony of A. E. Yount.)

Mr. Neuner: Q. Now I am still in doubt about one or two of those statements you made there about having seen him at the Clackamas County Fair and several times since that time. I am concerned about these policies, these two that are involved here. The fact of the matter is, he took your advice on insurance, didn't he?

A. Yes, sir, with one exception.

Q. Yes. Well, he took these policies on your solicitation? A. Yes, sir.

Q. And he paid you some of the premiums?

A. Premiums were paid——

Mr. Davis: Now if the Court please, I object to that question, using the term that he paid him some of the premiums. The policies provide how the premiums are to be paid, and there are no premiums in question other than the premiums here on October 17, 1940.

Mr. Neuner: Here, your Honor, is an agent that has been with the company a long time. Here he has a confidant on whose insurance he advises him and to whom the insured paid his policies. Our contention is we have a right to show that, to show the rela- [39] tionship, because the company has received the proceeds from these policies.

Mr. George Wm. Neuner: Premiums.

Mr. Neuner: The proceeds in payment of these premiums, and we maintain it is very material, and we believe we are within our rights to show that relationship.

(Testimony of A. E. Yount.)

The Court: I think it would be better if you would move now to the events on November 13th and then work back from there to the relations of the parties.

Mr. Neumer: All right.

Q. Now did you see Warren L. Miller on November 13th, 1940? A. Yes, sir.

Q. Where?

A. Well, perhaps—I don't know the distance there but it was on a farm adjoining his home ranch where he was.

Q. And about what time was it?

A. Between one thirty and two o'clock, I would judge.

Q. Will you please tell the jury why you went out there. A. Well, I had this—

Mr. Davis: Now, if the Court please, we object to that as incompetent, irrelevant and immaterial, not binding upon the defendant.

The Court: He may answer.

A. I delivered a policy for his son. That was the birthday of the son, and I took the policy there at that particular time. [40]

The Court: Did you go to the house first?

A. I went to the house first, yes, sir.

The Court: To find out where he was?

A. To find out where he was. I was a little bit late getting in there. I nearly always called at noon, because he was at home at noon.

The Court: Did you find out from Mrs. Miller?

A. Yes, sir.

(Testimony of A. E. Yount.)

Mr. Neuner: Q. Who did you deliver this policy to? A. To Warren L. himself.

Q. All right. Now tell the jury whether or not there was any conversation between you and Mr. Miller relative to the premium due on his policy on October 17th, 1940. A. Yes, there was——

Mr. Davis: Now just a minute. If the Court please, I think he could answer that question either “yes” or “no”, which he did answer “Yes”.

The Court: Did you answer “yes”?

A. Yes, sir.

Mr. Davis: Now we are going to object to the introduction of the conversation, if it is with respect to the premiums on these policies in question, because the agent has no authority under these policies in respect to these premiums in question, and any conversations or any statements he made at that time are not binding upon the defendant. [41]

Mr. Neuner: I will withdraw that and ask this question.

Mr. Davis: Furthermore, if the Court please, we think the pre-trial order covers all of these questions we are going into at the present time.

The Court: The question has been withdrawn.

Mr. Neuner: Q. Was there anything said at that time regarding the premiums on his policies?

A. Yes, sir.

Mr. Davis: If the Court please, we object to that question on the same reason. The Court is going to have to rule on it.

(Testimony of A. E. Yount.)

The Court: Yes, I will rule. Don't worry about that. He just answered the preliminary "yes". Now ask the next question.

Mr. Neuner: Q. What was said?

The Court: Now wait a minute.

Mr. Davis: Now if the Court please, defendant objects to this question on the ground that the agent has no authority to bind the company in respect to these premiums in question. He had no authority to collect them. Any conversations which he had at that time with the assured are not binding upon the defendant.

The Court: The objection is overruled. He may answer. Go on and tell what happened between you and Miller. Now what was said and what was done? This is all subject to the objection of the defendant.

A. The policy for the boy was—— [42]

The Court: Where did you find him? Out in the field?

A. Yes, sir.

The Court: What was he doing?

A. He was running a tractor and plowing.

The Court: Was he alone? A. Yes, sir.

The Court: Just you and he had this talk?

A. Yes, sir.

The Court: Go ahead and tell what was said between you and what was done, all subject to the defendant's objection.

A. Well, it had nothing to do with the boy's policy anyhow.

The Court: What?

(Testimony of A. E. Yount.)

A. I couldn't say anything about the boy's policy.

The Court: No. That is just incidental.

A. Yes, sir.

The Court: That is the reason you went to see him, I understand?

A. Yes, sir. That is right.

The Court: To deliver that new policy on the boy's life?

A. That is right. And in the course of delivering this new policy he asked me about the settlement of it and if he might arrange for thirty days' time in which to clear it.

The Court: That is on the new policy?

A. That is on the new policy, yes, sir.

The Court: That would be the first premium on it? [43]

A. That would be the first premium on it. I am responsible for that premium.

The Court: That is not the policy, gentlemen, in this case.

The Witness: That is right.

The Court: There are two other policies in this case. This explains how this gentleman happened to go to see him that day.

The Witness: Then when we fixed up and arranged for the policy for the boy, his son, then I said to him, "Now don't forget that your own policies—you must mail us your check by the 17th." "Well," he said, "I will give you a check for it now if you know how much it is."

(Testimony of A. E. Yount.)

The Court: You were talking to him on Wednesday, the 13th?

A. I was talking to him on the 13th. I am not sure of the day, your Honor, without looking it up on the calendar, but it was on the 13th day of November, because that is the boy's birthday. So he said, "I will give you a check for it now if you know the amount." So I told him the amount, and so he started to write the check and I said, "Make the check to the company." He made the check to the company and when he gave it to me I noticed that the amount was correct and was made to the company, and otherwise than that I paid no attention to him—I paid no attention to it. I don't recall that I gave a receipt for it at the time.

The Court: He had a check book with him, I suppose?

A. Yes, sir, he did. He had a check book with him. [44]

The Court: In his pocket? A. Yes, sir.

The Court: He got down off of the tractor?

A. He came down really into the yard in front of the house where I drove in. He expected me that day and was watching for me.

The Court: Oh, he came into the yard then?

A. Yes. He left his tractor. He left his tractor out where he was plowing and came up into the yard.

The Court: He saw you out there?

(Testimony of A. E. Yount.)

A. Yes, sir. I drove in there and he saw me. He was watching for me. He expected to see me. As I recall, his wife told me——

The Court: No. You don't need to give that.

The Witness: That is right. So I came to Portland and turned the check over to the cashier's office.

The Court: You had told him that it must be paid by the 17th? A. Yes, sir.

The Court: I understood you to say?

A. Yes, sir; that is right.

The Court: That was the last day of grace?

A. That was the last day of grace.

The Court: No doubt you picked up that information? Anyhow, you thought he should have that in mind?

A. Yes, that is right. We had talked about it when I got the application for the boy's insurance.

The Court: Go ahead now. [45]

A. That pretty well closed the incident. He got on the tractor and went to work, I came back to Portland and I turned the checks over to the cashier's office and asked that receipts be mailed.

The Court: That afternoon?

A. That afternoon, yes, sir.

The Court: At what time, do you know? Was it after banking hours?

A. Yes, sir. I imagine it would be after banking hours, because I drove in from there, and I left him probably some time about two o'clock.

(Testimony of A. E. Yount.)

The Court: That was the 13th?

A. The 13th, yes, sir. I drove to Portland, parked the car and went to the office, so I judge the cashier's office didn't get the check before four o'clock.

The Court: You said a minute ago you were not sure you gave him any kind of receipt.

A. I am not certain that I gave him any receipt at all for the check. I am not certain I did.

The Court: You say now you didn't notice what date he put on the check?

A. No, sir, I didn't notice the date on it?

The Court: It was dated, in fact, the 17th?

A. I found that out afterwards but I didn't know at the time.

The Court: Go ahead, Mr. Neuner. [46]

Mr. Neuner: Q. You knew the date, didn't you?

A. You mean I knew the date of the check?

Q. You knew the date that you were out there?

A. Oh, yes, I knew the date because of the boy's birthday and the date of his policy.

Q. You made out a note in your own handwriting and dated it, didn't you, the 13th?

A. Yes, sir, but that had nothing to do with his policies.

Q. No, but you say that you called his attention to the fact that he should not forget his own policies?

A. Yes, sir.

Q. And you want to tell this jury——

The Court: That must have been—I would like to keep these days in mind; it helps me and may

(Testimony of A. E. Yount.)

help the jury. That must have been on Wednesday, gentlemen.

Mr. Neuner: On Wednesday, yes.

The Court: Because the following week, Thursday, Thanksgiving, was the 21st.

Mr. George Wm. Neuner: That is right. The 13th was a Wednesday.

The Court: So this was on Wednesday of the week, gentlemen of the jury, that this talk was had out there, Wednesday, the 13th, and the check was dated the 17th, which it turned out was the following Sunday; is that correct?

Mr. Davis: That is right. [47]

The Court: Now Mr. Neuner, pardon the interruption.

Mr. Neuner: Q. When did you next go to see him?

A. I never saw Mr. Miller after that. I saw his wife Saturday following his accident. No; Monday following his accident.

Q. That was on the 2nd of December?

A. If that would be the date that would be the one. I understand he was injured the 27th. I went to the Coast, came back Friday night and saw the announcement of his injury in the newspaper and then I went the following Monday.

Q. You say you saw the account of his injury Friday night?

A. I believe I saw it in the paper Friday night, when I came back from the Coast.

(Testimony of A. E. Yount.)

Q. That was the 29th?

A. I don't know the date.

Q. And then you went out there the following Monday?

A. Yes, sir.

Q. Did you report to the office that he had been injured?

A. No, sir.

Q. Now when you stated that he came over and signed the check in the yard, which yard did you mean, the yard of the house or the place where he was living or in the place where he was plowing?

A. The place where he was plowing. He didn't leave that place.

Q. That was some mile or two miles from the other place, was it not? [48]

A. Yes, sir.

Q. Where did Mr. Miller get the check book that he wrote you the check from?

A. He had it in his pocket. I think, as I recall, Mrs. Miller told me that he had a check with him—a check or a check book with him.

Q. Did you tell Mrs. Miller what you wanted?

A. She knew. I don't think I said anything about it.

Q. And she volunteered that, that he had a check book with him?

A. He expected to see me that day because it was the boy's birthday. This policy was issued to the boy on his birthday and it was to be a birthday present.

Q. Did he have a pen?

(Testimony of A. E. Yount.)

A. I am not certain whether he used my pen. Probably he did.

Q. What did he use as a table to write the check on?

A. Sat down on the running board of my car and wrote on his knee.

Q. Were you out or were you in the car?

A. I was in the car.

Q. On the side that you were on?

A. Yes, he was on the side I was on.

Q. Now I am going back now to other premiums that he paid on this policy. What was his custom of paying these premiums?

Mr. Davis: If the Court please, we object to that as incompetent, irrelevant and immaterial, not within the issues of the case. [49]

The Court: For the time being the objection is sustained. I will hear you later, Mr. Neuner, about that.

Mr. Neuner: Q. You have collected premiums from him before on these policies, have you not?

Mr. Davis: If the Court please, that is objected to on the same grounds.

The Court: The same ruling.

Mr. Neuner: Q. At the time that he wrote this check in your presence, did you see him make any entries in the check book?

A. No, sir. I don't—I didn't know anything about his own personal setup at all.

(Testimony of A. E. Yount.)

Q. Well, did he just write out the check, or did he finish the stub?

A. He sat on the running board of my car and I was in the seat, and it is a coach and, as I recall, I am not certain whether the door was closed or not but anyway he was down below me as he sat on the board and I didn't—I couldn't have seen his check book without looking over his shoulder particularly to read it as he went along, and I didn't do it.

The Court: Did you leave that new policy there or at the house as you went by the house?

A. I left the new policy with him for the boy.

The Court: Do you remember what kind of a day it was?

A. Well, I don't, any more than I think it was an overcast day. It wasn't raining. [50]

Mr. Neuner: Q. You are acquainted with the L. A. Miller, the father?

A. I know him, not very well. I know Mr. Miller.

Q. Do you know the other members of the Miller family?

A. No. I have met—I met the Mrs. Miller, Warren's mother, in some years gone back, but I don't know the other members of the family.

Mr. Neuner: You may cross examine.

Cross Examination

By Mr. Davis:

Q. Mr. Yount, did you have the official premium receipts with you? A. No.

(Testimony of A. E. Yount.)

Q. At the time you called on him on November 13th?

A. No. The agent never has those receipts. Those could only come from the cashier.

Mr. Davis: That is all.

Mr. Neuner: Just a minute, please. I would like to open the sealed exhibits and inspect one of them, if I may.

The Court: Well, open them by order of the Court, which is the usual practice. Let me look at them.

(The sealed exhibits were opened by the Clerk and examined by the Court.)

The Court: Show them to Mr. Davis now, Mr. Neuner, please.

Mr. Neuner: I would like to have this marked, please, Plain- [51] tiffs' Pre-Trial Exhibit No. 23, I guess.

(The note dated November 13, 1940, to A. E. Yount in amount of \$29.70, signed Warren L. Miller, so offered, was marked Plaintiff's Pre-Trial Exhibit 23.)

The Court: I am going to suggest you defer examination on that until I can hear you on it and Mr. Yount will remain in attendance.

Mr. Neuner: What is it?

The Court: Just defer that until I hear you on it. Mr. Yount will remain in attendance. I will request him to do so.

(Testimony of A. E. Yount.)

Mr. Neuner: Yes. That is all I have, your Honor.

The Court: Any further cross?

Mr. Davis: No further cross examination.

The Court: Stay in the court room, Mr. Yount, for a little while until you are excused.

(Witness withdrawn.)

RETA D. MILLER,

one of the plaintiffs, was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Neuner:

Q. Your name is Reta D. Miller?

A. Reta D. Miller, yes. [52]

Q. Speak up so the jury can hear you, please. What relationship were you to Warren L. Miller?

A. Wife.

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. And Warren D. Miller and Marcia M. Miller, minors, are they the son and daughter of yourself and Warren L. Miller, deceased?

A. Yes.

Q. All plaintiffs in this case? A. Yes.

Q. Mrs. Miller, I will ask you to tell the jury whether or not Warren L. Miller ever saw the Plaintiffs' Pre-Trial Exhibit No. 4 here.

(Testimony of Reta D. Miller.)

Mr. Davis: Just a minute.

The Court: Just a minute, Mrs. Miller. Have you finished the question?

Mr. Neuner: I have finished the question.

The Court: And what was the question, whether he ever saw it?

Mr. Neuner: Whether Warren L. Miller during his lifetime——

The Court: You mean after he gave it to Mr. Yount?

Mr. Neuner: Yes; upon its return.

The Witness: No.

Mr. Neuner: My question probably was—strike that, please.

Q. Mrs. Miller, I will ask you to examine Plaintiffs' Pre-Trial Exhibit No. 4 and state whether or not you have seen that before. [53]

A. He didn't see it.

Q. I asked you whether you saw it before.

A. I saw it when it was returned to me.

Q. Yes. Well, tell the Court and jury when it was returned.

A. I had never seen the check until it was returned to me when I opened the registered letter and saw this check.

Q. Now then, after it was returned——

The Court: That was the day after the accident, wasn't it?

A. Yes, it was the day after the accident.

The Court: He was in the hospital at that time?

(Testimony of Reta D. Miller.)

A. He was in the hospital when I opened the letter and got this check.

Mr. Neuner: Q. Did Warren L. Miller see that check after it was returned?

Mr. Davis: Now, if the Court please——

A. No.

Mr. Davis: ——I move to strike the answer.

The Court: On what ground, Mr. Davis?

Mr. Davis: On the ground that she may not have been in his presence during all of that time. It is entirely immaterial. I think she could testify as to what she did with the check, and as to whether or not she showed it to him.

The Court: All right. Go at it that way.

Mr. Neuner: That is all right.

Q. What did you do with that check when you received it on the [54] 28th of November.

A. Well, I opened it and after I saw what it was I immediately went uptown and got a money order and gave them what they asked for.

Mr. Davis: Now, if the Court please, I move to strike the answer as not being responsive to the question.

The Court: Mrs. Miller, what you mean is, you mailed the money order in to them?

A. Yes.

The Court: That is all you mean?

A. I mailed a money order in to them, and I got the money order and mailed it.

(Testimony of Reta D. Miller.)

Mr. Davis: I think the Court should understand we are objecting to all the testimony of transactions subsequent to the mailing of this check back to the assured, as not being within the issues.

The Court: You had better restate your issue on that without leaving it to me to make the record. I understand it, but——

Mr. Davis: For the record, we are objecting to the testimony in regard to the postoffice money order because it has no bearing upon the issues in this case and is subsequent to the transaction in respect to the payment and subsequent to the transaction in respect to which the plaintiffs claim constituted payment.

The Court: The answer may remain regardless of the objection. [55]

Mr. Neuner: Q. Now the exhibit which you hold in your hand, Plaintiffs' Pre-Trial Exhibit No. 4——

Mr. Davis: May I interrupt just a minute, please? If the Court please, part of her answer was that she gave them what they asked for.

The Court: Yes, and I sought to clear that up by asking her if it was not a fact that all she meant was she got a money order and sent it in for the amount of the check.

Mr. Davis: As long as that is understood, because the letter requested an application for reinstatement, which wasn't returned, and I didn't want the record to show that she was saying that it was returned.

(Testimony of Reta D. Miller.)

Mr. Neuner: That letter is Plaintiffs' Exhibit—what *it* it, 4-a?

Mr. Davis: 3, I think.

The Court: 3 is the letter of Mr. Durham enclosing the application for reinstatement.

Mr. Neuner: Q. I hand you now Plaintiffs' Exhibit 3 and ask you to tell the jury whether or not that was a letter received by you?

A. Yes, it is.

Q. Now then, when you stated that you got the money order, what they asked for, what did you mean?

A. Well, I meant I wanted to make the check good. I immediately got a money order and paid the check. [56]

Q. And I will ask you to tell the jury whether or not that was in compliance with that letter.

Mr. Davis: If the Court please—

A. That was the way that I read it.

Mr. Neuner: Q. Yes. In other words, there is where you got the amount, the suggestion for the \$49.07; is that correct?

A. \$49.07, with interest.

Q. You mailed that when?

A. November 29th—28th.

Q. The date you received it?

A. The day I received this I went uptown in the afternoon.

Q. Do you know whether you wrote any letter or anything?

(Testimony of Reta D. Miller.)

A. I just wrote a little note in it.

Q. Did you keep a copy of that?

A. No, I didn't.

Mr. Neuner: Have you got that note?

Mr. Davis: Yes, I think I have. I think it just said she was enclosing a money order.

Mr. Neuner: Q. Do you recall what you said in that note?

A. I don't. I think I just said, "Enclosed amount for so much", and put my name to it. I think that is all in it.

Q. That was the day after your husband was——

A. Yes.

Q. Now from the time that your husband was injured where was he until the time of his death?

[57]

A. He was in the General Hospital in McMinnville.

Q. Did you see him during that time?

A. I saw him. I didn't talk to him.

Q. Why?

A. Well, he was in an unconscious condition and he didn't talk to anyone either——

The Court: Injured on the 27th and passed away on what day? A. December 3rd.

Mr. Neuner: The 3rd.

The Court: December 3rd.

Mr. Neuner: Q. Now then, that money order was returned to you?

A. After his death.

(Testimony of Reta D. Miller.)

Q. And I believe that is Plaintiffs' Exhibit No. 8. And when did you receive that? You say after his death; what day?

A. December 3rd, in the afternoon. He died in the morning and I received the return of the money order in the afternoon, December 3rd.

Q. I hand you now what purports to be a money order and ask you if that was the document which you obtained? A. Yes, it is.

Q. And where was that obtained?

A. McMinnville postoffice.

The Court: And that was sent back to you?

A. That was returned to me. [58]

Mr. Neuner: Q. How long did you live on the farm?

A. Nearly ten years. It would have been ten years in April.

Q. And where were you first married?

A. In McMinnville.

Q. When? A. December 24th, 1925.

Q. Now we hand you Plaintiffs' Pre-Trial Exhibit No. 6 and ask you to peruse that and state whether or not you know what it is.

A. Yes. This is his check book.

Q. Whose check book?

A. Warren Miller's.

Q. And whose writing is that "New York Life", or whatever it is there on that stub?

A. That is his writing.

(Testimony of Reta D. Miller.)

Q. I wish you would tell the Court and jury what his policy was, if you know, with reference to keeping his check stubs up to date.

Mr. Davis: If the Court please, we object to that as incompetent, irrelevant and immaterial, and not within the issues of this case.

Mr. Neuner: Very well. If they don't want it I won't insist on it.

Q. Now where was the account kept, Mrs. Miller? A. The First National Bank.

Q. Of——? [59] A. McMinnville.

Q. Did he keep any other account there?

A. At times he has had a special account, but he didn't—he has had two accounts at different times.

Q. Well, at the time when this occurred?

A. It was just the one account, L. A. Miller & Son.

Q. And who had access to draw checks against that account?

A. I did and himself. We both drew on it.

Q. Did you have a separate check book, or did you use the same check book that he used?

A. I used the same one, because I seldom wrote a check unless he was away.

The Court: Because what?

A. I only wrote one when he was away. He did all the checking.

The Court: How did that happen to be carried in the name of L. A. Miller & Son?

(Testimony of Reta D. Miller.)

A. Well, that was the name of the firm.

The Court: L. A.?

A. L. A. Miller & Son farm. It was Twin Springs Guernsey Farm.

The Court: L. A. Miller was his father?

A. Yes. He owned the farm.

The Court: But his father didn't check on that account?

A. No, his father didn't check on it.

The Court: Your husband, I believe was stated at the pre-trial—a good many of these things have been gone over, gentle- [60] men, at the pre-trial. You have had experience with that before here in other cases. A good deal of detail was explained to you as we went along, explained to you as to what was admitted at the pre-trial and does not have to be proved here. It was admitted by the parties—and this is very largely a case of that kind, too—it was admitted at the pre-trial that besides farming there your husband had a milk route.

The Witness: Yes.

The Court: In and around McMinnville.

The Witness: Yes.

The Court: And he deposited in this account I suppose his proceeds from the——

A. From everything, yes; L. A. Miller & Son's.

Mr. Neuner: Q. Now when you saw that check, Pre-Trial Exhibit No. 4, or Exhibit No. 4, was that all in the handwriting of your husband, Warren L. Miller? A. Yes.

(Testimony of Reta D. Miller.)

The Court: Have you checked it to make sure of that? Have you looked through it to make sure of that?

A. Through this, you mean?

The Court: Yes.

A. Not until after his death, where I finished writing in there.

The Court: But everything prior to his death there? A. Yes.

The Court: That is in the stubs, is in your husband's hand- [61] writing? A. Yes.

The Court: He had that check book on his person at the time of his injury, do you remember?

A. No.

The Court: What? A. He didn't.

The Court: It was at home?

A. It was at home.

Mr. Neuner: Q. How did they get it?

A. Pardon?

Q. How did they get the check book?

A. It was in the desk.

Q. And you got it? You got the book?

A. This? Well, it was right there, yes, in the desk, when I looked for it.

Q. Well, where was it when he wrote the check to Mr. Yount?

A. Well, he had it in his pocket I suppose that day. He carried it frequently.

Q. Oh, I see. That is what I was getting at.

A. Frequently he did. The day of the accident he didn't.

(Testimony of Reta D. Miller.)

Q. Did anyone else have control or access to the desk or that book? A. No.

Q. Besides you and Mr. Miller?

A. No. [62]

Mr. Neuner: I think you may cross examine.

The Court: We will take the afternoon recess now.

Mr. Neuner: Your Honor, I have two witnesses here to call; if I could take them out of place, it will take just a minute.

The Court: Would you like to do it now?

Mr. Neuner: Yes, I would like to do it before the recess; yes.

The Court: You may step down, Mrs. Miller.

(Witness withdrawn.)

Mr. Neuner: Call Mr. Skulason.

B. G. SKULASON

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Mr. Neuner: We would like to offer that. I didn't offer that check stub in evidence. Have it marked.

Mr. Davis: If the Court please, the defendant objects to the admission of the check stub, for the reason that it is entirely incompetent, irrelevant and immaterial, makes no difference in this case; for

(Testmony of B. G. Skulason.)

the further reason that it does not show, the testimony does not show that the entries which are made in this book were made at or about the time of the issuance of the check here in question. I think that if it is to serve any purpose at all it would have to be made at the time the check was written. [63]

The Court: It is admitteed.

(The check stub so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 6, was further marked "and trial".)



BY E. H. [illegible]

56 3/4

JAN 23 1919
DISTRICT OF OREGON
BANK OF OREGON
No. 56305
Pay to cash
For 56305
Total 56305
This Check 56305
Balance 56305
Deposit 56305
38 29

No. 19 Date Jan 23
Pay to cash
For 56305
Balance 56305
Deposit 56305
Total 56305
This Check 56305
Balance 56305

(Testmony of B. G. Skulason.)

The Clerk: May I have your correct name for the reporter?

The Witness: B. G. Skulason.

Direct Examination

By Mr. Neuner:

Q. Mr. Skulason, what is your profession?

A. I am a practicing attorney at law.

Q. And how long have you practiced that profession? I am not asking your age.

A. Something over forty years.

Q. Are you duly licensed to practice in the State of Oregon? A. Yes.

Q. And during that time you have practiced in the State of Oregon?

A. Over thirty years now in Oregon.

Q. And you maintain an office now in the City of Portland? A. Yes.

Q. In the practice of law? Are you familiar with attorneys' fees to be allowed in suits or actions in courts of law? A. Yes, I am.

Q. In this case, wherein the plaintiff has instituted suit against the New York Life Insurance Company on two life insurance policies, and wherein the first cause of action alleges the first policy [64] for \$3,000, double indemnity in case of accidental death, and a family provision paying \$30.00 per month for a period of twenty years; the second cause of action is on a policy of the same company, the face value of \$2,000——

The Court: Is Mr. Lewis going to be your other witness?

(Testmony of B. G. Skulason.)

Mr. Neuner: Yes.

The Court: Well, I suggest that he listen to this recital so that he may answer on the basis of the same question asked of Mr. Skulason.

Mr. Neuner: Yes.

Q. (Continuing) —the face of \$2,000 with double indemnity in case of accidental death, with a family provision of \$20.00 per month for a period of approximately twenty years. The company denies liability on these policies, claiming a lapsation thereof; and the complaint in the usual form, however an amended complaint was filed, the answer thereto, a couple of pre-trial conferences were had in connection therewith, briefs were prepared on both sides and the general preparation in connection with the submission of the cause to the jury. The complaint alleges in the first cause of action a reasonable attorneys' fee of \$1500 and on the second cause of action a reasonable attorneys' fee of \$1000. Now based upon your experience as a trial lawyer, what would you say would be a reasonable fee to be allowed the plaintiff in case she prevails in this action?

The Witness: May I ask a question? [65]

Mr. Neuner: Yes.

The Witness: Are the issues the same in the two causes of action?

Mr. Neuner: Yes.

The Witness: What would be the gross amount of the recovery in case the plaintiff prevails in the first cause of action?

(Testmony of B. G. Skulason.)

Mr. Neuner: Oh, I suppose it will be around eighteen or twenty thousand, wouldn't it?

Mr. Davis: On the first?

Mr. Neuner: On the two.

Mr. Davis: On the two of them, yes, somewhere in that neighborhood.

The Witness: And what are the prospects as to the length of time this will take in this Court?

The Court: Today and tomorrow. There have been two extensive pre-trials, and the briefs are extensive, involving difficult questions.

A. Well, I think that \$3,000.00 in both causes of action would be a reasonable fee, dividing that between the two in proportion to the amounts involved.

Mr. Neuner: You may cross examine.

Cross Examination

By Mr. Huntington:

Q. Mr. Skulason, if the case involves principally one issue, and that is the question of whether or not certain premiums were paid, [66] and the trial principally around that issue, what would you say then as to the fee, keeping in mind that there was the same issue in both causes of action?

A. Well, I consider the amount involved and the result, and the eminence of counsel for the plaintiff; I take into consideration all the elements the Supreme Court has laid down in the fixing of attorney fees, and I think that would be about right. three thousand dollars.

(Testmony of B. G. Skulason.)

Q. Did you take into consideration the amount of time involved? A. Yes.

Q. About how much time?

A. Well, from what has been stated here, I don't know how much time has been taken or required outside of court, but in a case of this kind, according to my experience the work is done before even the pre-trial procedure begins, in the office. A case of this kind requires very close and careful analysis of the facts and the law, and requires a high type of legal talent to take care of it properly. I think they would be entitled to \$3,000 if they prevail in this case.

Q. Have you in mind the per diem schedule of the state court?

A. No, I haven't. I didn't think of that. That is with reference to contingent fees mostly.

Q. Well, the per diem schedule?

A. Oh, the per diem schedule?

Q. So much per day. [67]

A. Oh, I don't remember what that is.

Q. You don't know whether it is fifty dollars a day?

A. Well, if it is fifty dollars a day it is clear out of reason. If it is fifty dollars a day it is clear out of reason for a case of this kind.

Mr. Huntington: That is all.

(Witness excused.)

ARTHUR H. LEWIS

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Arthur H. Lewis?

The Witness: Arthur H. Lewis.

By Mr. Neuner:

Q. Mr. Lewis, you are a lawyer?

A. Yes, sir.

Q. How long have you been in the practice of law?

A. 'Thirty years.

Q. Where?

A. Portland, Oregon.

Q. That entire time?

A. That entire time.

Q. And your father before you was——

A. My father before me was a lawyer, yes. [68]

Q. During your experience have you ever had occasion to pass upon what is a reasonable attorney fee in different kinds of litigation?

A. I have.

Q. Did you hear my statement to Mr. Skulason?

A. I did.

Q. Now adding to that statement, assuming in addition to what I have stated that it has taken considerable time for the preparation of the case, the exact time, as you know from your experience as a practical lawyer, it is nearly impossible to state, but covering off and on over a period of six months, what would you say would be a reasonable attorneys' fee to be allowed the plaintiff in case she prevails, in a case of this kind?

(Testimony of Arthur H. Lewis.)

A. I believe twenty-five hundred dollars would be a reasonable fee.

Mr. Neuner: You may cross examine.

Cross Examination

By Mr. Huntington:

Q. Mr. Lewis, have you ever had offices with Mr. Neuner?

A. Yes; young George Neuner, yes; not Mr. Neuner, senior.

Q. And is that true at the present time, or what is the arrangement?

A. Yes. George Neuner has a desk and an office there with us, Mr. Moore and myself; although at the present he is down at the Attorney General's office. [69]

Mr. Huntington: I think that is all.

(Witness excused.)

The Court: Now gentlemen of the jury, the afternoon recess.

(The jury here retired and the following proceedings were had without the presence of the jury:)

The Court: These questions that are reserved you had better discuss now. There are several. Do you desire to press the inquiry, Mr. Neuner, that you started to make of Mr. Yount about custom in the past as between him and the deceased, with re-

gard to the payment of premiums? That was one of the questions you reserved.

Mr. Neuner: Yes. I don't think it is necessary, your Honor, with the turn the matters have taken. However, I want to introduce that note, for the reason that it is stamped by the New York Life Insurance Company and I want it to go in on the proposition that these acts of the agent are ratified and all done with knowledge of the company.

The Court: Which note is that?

Mr. Neuner: That is the note given for the boy's insurance.

The Court: I don't need to see it, Mr. Neuner. Do you have in mind, Mr. Davis, what it is?

Mr. Davis: Yes, I have in mind what it is.

Mr. Neuner: I don't know whether there will be any objection to that. [70]

Mr. Davis: There certainly will.

Mr. Neuner: I would be surprised if there wasn't. But I might state that these agents run loose around through the country and do everything under the sun—I think I am permitted to state that, the jury not being here—and the company of course urges them on.

The Court: It depends on how loud you talk.

Mr. Neuner: Well, I will try not to talk loud.

The Court: I know when your enthusiastic spells are coming on.

Mr. Neuner: And I believe that we are entitled to show that, but I don't want to urge it if there is any question about the admissibility of it. I

think perhaps we would be entitled to it. I don't know whether it would be of any assistance to the jury. It would merely amplify the record in connection with these dealings. If we are going to be confined just to the one transaction, and if that is the issue, why, then of course it would be doubtful whether it would be admissible.

The Court: I don't believe it should go in.

Mr. Neuner: Very well. I will forego it.

The Court: Not that I am trying the case, Mr. Neuner.

Mr. Neuner: I know. I don't claim enough for it to take a chance.

The Court: Was there anything else reserved?

Mr. Neuner: The only other thing that was reserved was that [71] statement which I refrained from asking Mrs. Miller, and as I stated before.

The Court: What statement?

Mr. Neuner: The statement that her husband made to her.

The Court: That evening?

Mr. Neuner: Yes.

The Court: I have thought very seriously about that and taken advice with my colleague during the noon hour, as I am often helped by him, and I doubt the admissibility of that statement.

Mr. Neuner: Very well. I will forego that. So there is nothing else that I know of. Oh, the check. I offered that and I think there was an objection, but I think your Honor admitted that.

The Court: Yes, I admitted that.

Mr. Davis: That was admitted over objection.

The Court: That was admitted over objection.

Mr. Davis: There is just one question I wanted to ask, if the Court please. These exhibits I take it that are identified in the pre-trial order, it is not necessary to have them further identified on the stand to introduce them?

The Court: You could offer them in gross right now on each side, if you wanted to, which is often done, subject to objection by the adverse party as to their materiality and competency as to those exhibits where they do desire to object. That is often done. [72]

Mr. Davis: You want to do that now?

Mr. Neuner: Yes.

Mr. Davis: Well, supposing you go ahead.

Mr. Neuner: Well, we will offer Pre-trial Exhibit 5, which is the bank statement which we were asked to produce.

Mr. Davis: There is no objection to that.

The Court: It is admitted.

(The statement headed "L. A. Miller & Son, Warren L. Miller, McMinnville, Ore., in account with The First National Bank of McMinnville," so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 5, was further marked "and trial".)

PLAINTIFFS' EXHIBIT No. 5

L. A. MILLER & SON WARREN L. MILLER McMINNVILLE, ORE.

In Account with The First National Bank of McMinnville, McMinnville, Oregon

Date	Checks in Details		Deposits	Date	Balance
Nov. 1 '40	7.00—			Oct. 31 '40	278.60
Nov. 2 '40	15.20—	55.67—	5.65—	Nov. 1 '40	271.60*
Nov. 2 '40	24.00—	30.00—		Nov. 2 '40	141.08*
Nov. 3 '40	100.00—	15.20—	21.15	Nov. 3 '40	44.13*
Nov. 6 '40	10.00—	10.13—	78.15	Nov. 6 '40	102.15*
Nov. 7 '40	7.00—	13.77—	15.20—		
Nov. 7 '40	12.01—			Nov. 7 '40	54.17*
Nov. 8 '40	12.00—	1.00—	34.23	Nov. 8 '40	75.40*
Nov. 9 '40	14.68—			Nov. 9 '40	60.72*
Nov. 12 '40	1.50—	6.75—	15.20—	Nov. 12 '40	37.27*
Nov. 13 '40	7.69—		30.02	Nov. 13 '40	59.60*
Nov. 14 '40	12.25—	15.75—		Nov. 14 '40	31.60*

Date	Checks in Details	Deposits	Date	Balance
Nov. 15 '40	4.95—		Nov. 15 '40	11.45*
Nov. 16 '40	3.00—	56.65	Nov. 16 '40	9.20*
Nov. 18 '40	8.53—		Nov. 18 '40	.67*
Nov. 19 '40	1.25—	28.83	Nov. 19 '40	6.75OD
Nov. 20 '40	8.75—	31.75	Nov. 20 '40	1.05*
Nov. 22 '40	3.03—	28.85	Nov. 22 '40	26.87*
Nov. 25 '40	9.03—		Nov. 25 '40	17.84*
Nov. 27 '40	35.00—	25.12	Nov. 27 '40	7.96*
Nov. 28 '40	.93—		Nov. 28 '40	7.03*

The Last Amount in This
Column Is Your Balance

Vouchers Returned 37

Please Examine.

If Not Correct, Report at Once

If no error is reported within 10 days this account will be
considered correct.

Please advise if name or address is incorrect.

This Is Important.

[Endorsed]: Filed Jan. 21, 1942.

The Court: Let me fix in my mind as we go along now what the bank statement shows and what each side contends for that.

Mr. Neuner: On the 13th of November there was \$59.60 balance. On November 20th, the date reputedly the check was presented for payment, there was a balance of \$1.05. On November 22nd, the date that the endorsement was canceled——

The Court: In town?

Mr. Neuner: Here, there was a balance of \$26.87, and then it was reduced down to \$7.03 November 28th, the day following the accident.

The Court: There was never enough money in it to cover the check after the—— [73]

Mr. Neuner: After the 13th?

The Court: Yes.

Mr. Neuner: That is correct.

The Court: And the check stubs, is my memory correct that they show that there was at all times?

Mr. Neuner: I don't think, your Honor, that the stubs show that. I didn't look through, but we can't tell for the reason that the check stubs are not dated.

The Court: Let me put it this way: It seems to me I saw that exhibit and that every balance there is a true balance; there is no overdraft shown there; there is a balance shown there at all times?

Mr. Neuner: That is correct, on the check stubs.

The Court: That is what I am getting at.

Mr. Neuner: I think that is correct. I didn't look through it.

The Court: Is that the way you read those check stubs, Mr. Davis and Mr. Huntington?

Mr. Davis: Pardon me?

The Court: I looked through that at one time, I am pretty sure, and it showed a constant balance.

Mr. Davis: I don't recollect now what it did show.

The Court: It does not show an overdraft any place?

Mr. Davis: I don't believe it did.

The Court: And it shows a deduction for every check taken out [74] of the book?

Mr. Neuner: No, not every one.

The Court: Not every one?

Mr. Neuner: No. Here is one December 9th, 1940.

Mr. Davis: May I see it?

Mr. Neuner: But that was way after.

Mr. George Wm. Neuner: That was when Mrs. Miller was using it.

Mr. Neuner: Yes. That was Mrs. Miller.

The Court: I think I looked at that book at one time in an effort to satisfy myself somewhat about the deceased.

Mr. Neuner: There is no date on the check stub after the New York Life.

The Court: But there are a series of balances carried forward there.

Mr. Neuner: Yes.

Mr. Huntington: May I see it?

The Court: And just taking that—I don't know that it concerns me particularly, but for clarification here, just standing alone, it would indicate that the man thought he had a balance all the time. He carried balances forward there and they were all affirmative balances.

Mr. Davis: Of course, your Honor, the check is written in pen and ink and this entry with respect to New York Life is a pencil memorandum. I think I am right. Yes, it is a pencil memorandum. There is no testimony as to just when he made that [75] entry.

The Court: That is a matter of argument for you. Now what else have we reserved? Yes, you were offering your exhibits.

Mr. Neuner: Yes. I offer Exhibit 7, the Standard Certificate of Death.

The Court: Is there any objection?

Mr. Davis: No.

The Court: Admitted.

(The certified copy of death record of Warren LeRoy Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 7, was further marked "and trial".)

Oregon State Board of Health
Division of Vital Statistics

Standard Certificate of Death
STATE OF OREGON

State File No.

Local Registrar's No.

2463

1. PLACE OF DEATH

(a) County Yamhill
(b) City or town McCallville
(c) Name of hospital or institution General Hospital
(d) Length of stay 5 days
In this community 5 days
(e) Date of death April 8, 1940

2. USUAL RESIDENCE OF DECEASED

(a) State OREGON (b) County Yamhill
(c) City or town McCallville
(d) Street or place 117 North 1st St

(e) Report No.

(f) Date of death

(g) At foreign birth, how long in U. S. A?

3. (a) FULL NAME Warren LeRoy Miller

(b) Sex Male (c) Race White (d) Marital status Married

(e) Date of birth April 8, 1906 (f) Age at death 34 years

(g) Date of death April 8, 1940 (h) Date of burial April 8, 1940

(i) Date of death April 8, 1940 (j) Date of burial April 8, 1940

(k) Date of death April 8, 1940 (l) Date of burial April 8, 1940

(m) Date of death April 8, 1940 (n) Date of burial April 8, 1940

(o) Date of death April 8, 1940 (p) Date of burial April 8, 1940

(q) Date of death April 8, 1940 (r) Date of burial April 8, 1940

(s) Date of death April 8, 1940 (t) Date of burial April 8, 1940

(u) Date of death April 8, 1940 (v) Date of burial April 8, 1940

(w) Date of death April 8, 1940 (x) Date of burial April 8, 1940

(y) Date of death April 8, 1940 (z) Date of burial April 8, 1940

4. MEDICAL CERTIFICATION

(a) Date of death April 8, 1940 (b) Date of burial April 8, 1940

(c) Date of death April 8, 1940 (d) Date of burial April 8, 1940

(e) Date of death April 8, 1940 (f) Date of burial April 8, 1940

(g) Date of death April 8, 1940 (h) Date of burial April 8, 1940

(i) Date of death April 8, 1940 (j) Date of burial April 8, 1940

(k) Date of death April 8, 1940 (l) Date of burial April 8, 1940

(m) Date of death April 8, 1940 (n) Date of burial April 8, 1940

(o) Date of death April 8, 1940 (p) Date of burial April 8, 1940

(q) Date of death April 8, 1940 (r) Date of burial April 8, 1940

(s) Date of death April 8, 1940 (t) Date of burial April 8, 1940

(u) Date of death April 8, 1940 (v) Date of burial April 8, 1940

(w) Date of death April 8, 1940 (x) Date of burial April 8, 1940

CERTIFIED COPY OF DEATH RECORD

STATE OF OREGON | ss
County of Multnomah

I, Frederick D. Stricker, Secretary of the State Board of Health and State Registrar of Vital Statistics of the aforesaid state, do hereby certify that the foregoing copy of the certificate of death is an exact photostatic reproduction of the whole of such original certificate of death as same now appears upon file and of record in my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed my official seal.

Dated

Frederick D. Stricker

U. S. DISTRICT COURT
DISTRICT OF OREGON

FILE NO. 12-3-40

FILE NO. 12-3-40

FILE NO. 12-3-40

Mr. Neuner: I think we had marked as Exhibit 9 a letter. I don't know whether they have any objections to it or not.

Mr. Davis: Yes, there is objection.

Mr. Neuner: All right. We will withdraw it. That does away with that. I think those are our exhibits.

The Court: How about Yount's letter, No. 9?

Mr. Davis: We objected to that and they withdrew it.

Mr. Neuner: Which one?

Mr. Davis: Mr. Yount's letter. Isn't that what you just said?

Mr. Neuner: Yes. That is all.

The Court: Gentlemen, look at page 8 of the pre-trial order. There are a few clerical corrections to be made, I think.

Mr. Neuner: There is what? [76]

The Court: Paragraphs 8 and 9 refer to a number 8-a in both cases.

Mr. Huntington: Yes, there is.

The Court: Take Paragraph 8, shouldn't that be Exhibit No. 8 rather than 8-a?

Mr. Huntington: No. If the Court please, there were three of them. There wasn't any 8; there was an 8-a, an 8-b and an 8-c.

The Court: Well, 9 is 8-a also.

Mr. Davis: Well, I think what they intended there was that Plaintiffs' Pre-Trial Exhibit 8-a accompanied by an envelope in which it was mailed

marked Plaintiffs' Pre-Trial Exhibit 8-b, then the money order 8-c.

The Court: But 8 refers to 8-a as Mr. Durham's letter.

Mr. Davis: Yes. Then they are saying that Mr. Durham's letter was accompanied by an envelope.

The Court: All right.

Mr. Neuner: Yes.

The Court: Now look on page 3; how about your dates in paragraph 7?

Mr. Neuner: I think that word "terminating" should be "commencing".

Mr. George Wm. Neuner: That is in line 24.

The Court: The date in line 19 is wrong, the first date.

Mr. Davis: That is what I am trying to check now. That is right, the 29th of February, 1940. [77]

Mr. Neuner: Yes, that is right.

The Court: How about your date then in line 24? That should be 1940 instead of 1939 in line 24.

Mr. Neuner: No.

Mr. Davis: No. The policy reads 1939, if the Court please. You see, they dated this policy back to give him the benefit of a younger age.

The Court: I see.

Mr. Neuner: Yes, that is right.

The Court: Anyhow, you know I read the pre-trial order.

Mr. Davis: That is right.

The Court: Now your exhibits, Mr. Davis.

Mr. Davis: Now, if the Court please, defendant will offer Defendant's Pre-Trial Exhibits 10 and 11 in evidence, which are the official premium receipts.

Mr. Neuner: Objected to as being immaterial, incompetent and irrelevant to the issue in this case.

The Court: Those are the two Mr. Durham mailed out?

Mr. Davis: Yes.

The Court: When he deposited the check?

Mr. Davis: Yes.

The Court: They are admitted.

Mr. Neuner: Exception.

The Court: Not necessary.

(The official premium receipt for \$28.62, on Policy [78] No. 17,395,774 Q7, dated October 17, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 10, was further marked "and trial"; and Official Premium Receipt for \$20.10 on Policy No. 17,395,775 Q7, dated October 17, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 11, was further marked "and trial".)

OFFICIAL PREMIUM RECEIPT

NEW YORK LIFE INSURANCE COMPANY

HOME OFFICE 51 MADISON AVENUE, NEW YORK N. Y.

RECEIVED, WITH THANKS, THE PAYMENT SPECIFIED BELOW

PREMIUM \$ 28.62 POLICY NUMBER 17 395 774 Q7 DATE DUE 17 DAY OF OCT. 1919

INTEREST
ON LOAN
OR NOTE

WARREN L MILLER

GENERAL DELIVERY

MC MINNVILLE ORE



IF REMITTANCE OTHERWISE THAN IN CASH
HAS BEEN MADE THIS RECEIPT SHALL BE
VOID IF PAYMENT OF SUCH REMITTANCE IS
NOT ACTUALLY RECEIVED BY THE COMPANY

COUNTERSIGNED BY

Robert L. Aiken
PRESIDENT
J. H. Haglund
FOR CASHIER OREGON BRANCH OFFICE

3472 R B APRIL 1939

The annual election of Directors of this Company is held at its Home Office on the second Wednesday in April of each year. The law provides that if no independent nominations are made no votes shall be cast or counted except for candidates nominated by the Board of Directors. The polls are open from 10 A.M. to 4 P.M. and every policyholder whose insurance is in force and has been in force at least one year prior thereto is entitled to vote at such election as provided in Section 94 of the Insurance Law of the State of New York. Any policyholder desiring to vote by mail will receive a ballot and instructions upon application to the Home Office.

There are twenty-four elected Directors and eight are elected annually to serve for three years. Independent nominations may be made by groups of policyholders at least five months prior to the election as provided in Section 94 of the Insurance Law of the State of New York.

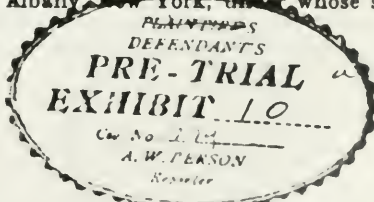
Anyone desiring any further information regarding elections should address the Superintendent of Insurance, Albany, New York, under whose supervision all elections are conducted.

APR 2 1939

G. H. Aiken

3472-R. B. April, 1939.

BY _____ DEPUTY



OFFICIAL PREMIUM RECEIPT			
NEW YORK LIFE INSURANCE COMPANY			
HOME OFFICE 51 MADISON AVENUE NEW YORK N. Y.			
RECEIVED, WITH THANKS, THE PAYMENT SPECIFIED BELOW			
PREMIUM \$	20.10	POLICY NUMBER	17 395 775 Q7
INTEREST ON LOAN OR NOTE		DATE DUE	17 DAY OF OCT. 1940
WARREN L MILLER			
GENERAL DELIVERY			
MC MINNVILLE ORE			
IF REMITTANCE OTHERWISE THAN IN CASH HAS BEEN MADE THIS RECEIPT SHALL BE VOID IF PAYMENT OF SUCH REMITTANCE IS NOT ACTUALLY RECEIVED BY THE COMPANY		COUNTERSIGNED BY	<i>Appl. L. P. P.</i> <i>E. H. March</i> PRESIDENT
FOR CASHIER OREGON BRANCH OFFICE			

3472 R B APRIL 1939

The annual election of Directors of this Company is held at its Home Office on the second Wednesday in April of each year. The law provides that if no independent nominations are made no votes shall be cast or counted except for candidates nominated by the Board of Directors. The polls are open from 10 A.M. to 4 P.M. and every policyholder whose insurance is in force and has been in force at least one year prior thereto is entitled to vote at such election as provided in Section 94 of the Insurance Law of the State of New York. Any policyholder desiring to vote by mail will receive a ballot and instructions upon application to the Home Office.

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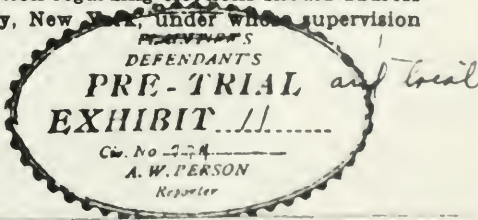
Anyone desiring any further information regarding elections should address the Superintendent of Insurance, Albany, New York, under whose supervision all elections are conducted.

JAN 21 1942

G. H. March, Clerk

3472-R B. April, 1939

BY _____ DEPUTY



Mr. Davis: Next, if the Court please, is Defendant's Pre-Trial Exhibit 12, which is the deposit slip showing the deposit of this check in the United States National Bank.

Mr. Neuner: No objection.

The Court: Admitted.

(The duplicate deposit slip of New York Life Insurance Company with United States National Bank, dated November 18, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 12, was further marked "and trial".)

DEFENDANT'S EXHIBIT No. 12

New York Life Insurance Company
Deposited by Portland, Oregon, Branch
For Credit of
New York Life Ins. Co. Account
With
U. S. National Bank

Date Deposited 11/18/40 \$9734.95

Date Previous Deposit 11/16/40 \$6261.37

R. A. DURHAM

Cashier

Carbon Copy is to be approved by Bank and sent to Home Office in Voucher Envelope No. 5407.

Coin

Bills

Checks (Give location of bank)

24-82 Portland 81.92

24-4 Portland 21.71

24-4 Portland 29.46

24-11	Portland	42.65
24-4	Portland	16.04
96-101	Tillamook	12.14
24-6	Portland	53.26
96-17	E.	390.64
24-11	Portland	49.56
24-11	Portland	58.57
24-11	Portland	2641.50
24-11	Portland	90.71
	Portland, Oregon	45.70
24-6	Portland	30.44
24-6	Portland	34.37
24-6	Portland	20.41
96-64	Klamath Falls	7.84
96-198	Merrill	19.84
96-17	E.	13.00
98-85	Renton, Wn.	28.47
36-334	The Dallas	192.90
96-48	Corvallis	30.24

 9734.95

24-11	Portland	1500.00
11-1	San Francisco	2.50
24-6	Portland	25.00
24-11	Portland	10.00
24-11	.....	8.00
24-70	Portland	5.00
24-11	.....	5.38
24-11	.....	14.85
96-48	Corvallis	13.50
[96-67	McMinnville	48.72]
96-274	Marsh.	31.40
96-17	E.	36.36
24-4	Portland	63.03
24-19	Portland	12.61
24-52	Portland	51.27
96-113	Condon	94.92
96-339	Heppner	238.91
M. O.	.....	26.69
96-2	Salem	49.60

96-113	Condon	13.34
96-165	Dufur	13.54
96-321	Newport	35.08
96-285	Lakeview	38.75
24-11	Portland	153.60
24-4	Portland	33.54
M. O.	.....	29.11
96-76	Dallas	6.65
98-217	Vancouver, Wn.	10.79
96-172	Fossil	68.37
M. O.	.....	10.19
24-4	Portland	13.51
96-165	Dufur	13.51
16-189	Los Angeles	37.75
96-33	Albany	16.19
96-1	Salem	6.26
96-1	Salem	6.30
M. O.	.....	8.30
99-25	Rock Springs, Wyo...	12.64
24-62	Portland	104.82
M. O.	.....	11.05
24-69	Portland	6.69
96-1	Salem	66.20
96-1	Salem	16.78
96-338	Pendleton	82.26
M. O.	.....	7.66
24-11	Portland	15.94
M. O.	.....	9.17
M. O.	.....	13.20
M. O.	.....	35.24
M. O.	.....	25.74
M. O.	.....	21.45
96-1	Salem	33.63
96-206	Mt. Angel	22.42
96-17	E.	8.82
96-274	Marsh.	9.15
244	Portland	34.76
96-86	Lebanon	8.54
M. O.	.....	15.41

24-11	Portland	27.11
24-69	Portland	9.01
24-52	Portland	17.85
24-82	Portland	19.79
96-94	Silverton	25.95
96-45	Roseburg	7.95
24-4	Portland	37.40
24-4	Portland	43.45
M. O.	.....	63.05
96-1	Salem	8.29
86-17	E.	32.16
96-343B.	.....	64.35
24-4	Portland	15.61
M. O.	.....	6.44
M. O.	.....	17.00
24-62	Portland	13.56
24-4	Portland	40.92
96-1	Salem	14.91
96-291	Tigard	72.70
24-11	Portland	153.80
24-4	Portland	8.00
24-52	Portland	20.00
24-11	Portland	25.00
Portland, Oregon	.....	25.30
96-291	Tigard	40.00
96-72	Hood River	14.55
96 17 E.	.....	9.40
96-2	Salem	11.10
96-24	Medford	12.36
96-64	Klamath Falls	5.07
24-6	Portland	84.98
96-287	St. Helens	34.60
24-6	Portland	16.93
96-74	Newberg	12.32
96-17	E.	13.58
96-49	Corvallis	35.00
96-48	Corvallis	40.00
96-24	Medford	31.00
96-10	Salem	8.00
M. O.	.....	2.00

96-11	Astoria	143.47
24-6	Portland	17.76
96-48	Corvallis	9.34
96-19	E.	7.06
96-72	Hood River	44.73
24-11	Portland	76.55
96-64	Klamath Falls	25.90
96-17	E.	32.84
96-16	Astoria	24.48
M. O.	.....	9.73
M. O.	.....	10.30
M. O.	.....	8.34
96-316	Oswego	7.66
M. O.	.....	7.48
96-11	Astoria	9.63
24-19	Portland.....	22.88
M. O.	.....	5.45
96-47	Roseburg	11.20
24-11	Portland	77.58
24-19	Portland	5.36
24-11	Portland	30.42
96-57	Albany	22.09
96-274	Marsh.	35.05
M. O.	.....	31.19
M. O.	.....	6.28
92-39	Twin Falls, Idaho....	6.70
96-62	Marsh.	48.33
M. O.	.....	8.32
96-109	Prineville	20.39
M. O.	.....	6.05
96-165	Dufur	18.11
96-49	Corvallis	8.54
M. O.	.....	11.49
96-287	St. Helens	27.98
96-64	Klamath Falls	[Illegible]
M. O.	.....	9.85
M. O.	.....	30.70
96-274	Marsh.	36.56
M. O.	.....	13.96

96-72	Hood River	7.88
96-274	Marsh.	6.60
M. O.	.....	10.37
96-84	Cottage Grove	43.30
21-4	Portland	14.16
24-4	Portland	36.90
24-4	Portland	93.90
24-4	Portland	19.64
24-81	Portland	28.68
M. O.	.....	31.44
M. O.	.....	26.68
24-11	Portland	26.32
96-2	Salem	72.33

[Endorsed]: Filed Jan. 21, 1942.

Mr. Davis: We now offer Defendant's Pre-Trial Exhibit No. 13, which is a slip marked "Returned by First National Bank, McMinnville, Oregon", for the reason as checked "not sufficient funds".

Mr. Neuner: We object to that as being immaterial.

The Court: Admitted.

(The slip headed "Returned by First National Bank, McMinnville, Ore.," so offered and received, [79] having been previously marked Defendant's Pre-Trial Exhibit 13, was further marked "and trial".)

RETURNED BY
FIRST NATIONAL BANK. 96-67
McMINNVILLE ORE. *McIntosh*

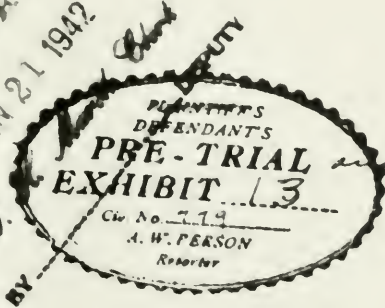
TO *2nd St. pr. 2d. Town*

FOR REASON UNDERLINED

Not sufficient funds	<i>Refund Letter</i> Missing endorsement	Pass book must accompany
No account	Payment not made	Signature unsatisfactory
Post dated	Savings account	Signature unauthorized
Not on us	Guarantee endorsement	Signature missing
Account closed	Not properly endorsed	Drawn on uncollected funds

Personal endorsement required Refer to maker

DISTRICT CL
DISTRICT OF OREGON
F. I. R. D
JAN 21 1942



BY *[Signature]*

in trial

Mr. Davis: We now offer Defendant's Pre-Trial Exhibit No. 14, which is a Return Item Memo, showing one other item and showing the amount \$48.72.

Mr. Neuner: What do you claim for that?

Mr. Davis: Nothing more than just to show the papers that came through in the transaction.

Mr. Neuner: Objected to as being immaterial.

The Court: It is admitted.

(The Return Item Memo dated November 22, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 14, was further marked "and trial".)

RETURN ITEM MEMO

Today

DATE

NOV 22 1940

NAME

N. Y. Life Insurance Co.

COLLECT

PHONE

SECURE

Copy to H. O.

Today

75 33
48 72

TELLER

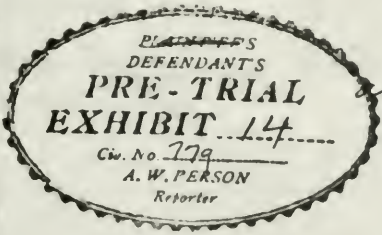
FORM 460

U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED

JAN 21 1942

G. H. March, Clerk

BY _____ DEPUTY



and trial

Mr. Davis: We now offer Defendant's Pre-Trial Exhibit No. 15, which is a check issued by New York Life Insurance Company to United States National Bank taking up this NSF check in question and some others.

Mr. Neuner: The same objection.

The Court: Admitted.

(The canceled check of New York Life Insurance Company dated November 25, 1940, for \$133.27, payable to U. S. National Bank, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 15, was further marked "and trial".) [80]

N.Y. Cks.
#16016209 - Kieber
#8328772 - Lindberg
#173959945 - Miller

NOV 25 1940

PORTLAND, ORE. _____ 19 _____

No G 2100

NEW YORK LIFE INSURANCE COMPANY
 OREGON BRANCH OFFICE

U.S. National Bank
One hundred thirty three

PAY TO THE ORDER OF

TO THE UNITED STATES NATIONAL BANK
 24-11 PORTLAND, OREGON

NEW YORK LIFE INSURANCE COMPANY, Account No. 2

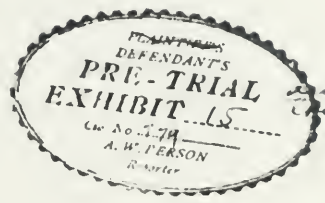
DOLLARS

27 100

133.27
\$133.100

BY

R. J. Sullivan
 CASHIER OREGON BRANCH OFFICE



U. S. DISTRICT COURT
 DISTRICT OF OREGON
 FILED

JAN 21 1942

G. H. Mason & Co.

BY _____ DEPUTY

Mr. Davis: If the Court please, at this time we are not introducing Defendant's Pre-Trial Exhibits 16, 17, 18, 19 and 20, unless it should become necessary by reason of further testimony of plaintiff. We now offer in evidence Defendant's Pre-Trial Exhibit 21, which is a copy of the original entry on Daily Premium and Commission Report of the New York Life Insurance Company for November 18, 1940. We understand from council that he is not objecting to this because it is a copy.

Mr. Neuner: Not as to identification. I have got an objection to it.

Mr. Davis: Yes.

The Court: Admitted.

Mr. George Wm. Neuner: If your Honor please, we would like to be heard on the introduction of Nos. 20, 21 and 22, which are the private records of the defendant Life Insurance Company.

The Court: 20 has not been offered.

Mr. Davis: No.

Mr. George Wm. Neuner: I meant 21 and 22. I presume you are offering 22?

Mr. Davis: We will offer both 21 and 22 so that he might make the same objection to both of them.

The Court: All right.

Mr. George Wm. Neuner: It has been held, your Honor, in two cases, one as late as 1941, a New Jersey law case, and the other one an Illinois case, not the Illinois Appellate Court [81] this time, in 1925, and I find no contrary holdings, in which this

very point was raised, in which the company sought to bring in its daily records in order to establish I presume the fact that certain things were done, and if I may be permitted to read very briefly from the holdings of those two cases——

The Court: I don't see why you are objecting to these. These seem to me to tend to prove your case. They are in line with your theory.

Mr. George Wm. Neuner: They are opposed, at least as to the first one. The second one probably won't hurt us; the first one being brought in on the theory that the first time the company itself had anything to do with the check was when it reached their books, which was on the 18th, I think, which this particular record will show, whereas our contention is that it reached the company on the 13th and they are seeking to bring these in to show how they dealt with this particular account, which is clearly self-serving in its nature, and it has been so held by the authorities that I just mentioned.

The Court: Go ahead. You want to read some authorities?

(Mr. George Wm. Neuner read from *Baxter v. Metropolitan Life*, 149 N. E. 243, and *Barbera v. John Hancock*, 21 Atl. (2d) 223.)

The Court: I think they should both come in; if not as a matter of fairness, if that were not enough, they would come in on the same principle that the deceased's check stubs came in, [82] the record of the transaction of the parties.

Mr. Neuner: We have the same objection——

The Court: They are both being admitted over the objection, which is recorded.

Mr. Neuner: Yes.

The Court: Exceptions are automatic under the New Rules.

(The copy of original entry on Daily Premium and Commission Report of New York Life Insurance Company for November 18, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 21, was further marked "and trial", and the copy of original entry on Daily Premium and Commission Report of New York Life Insurance Company for November 26, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 22, was further marked "and trial".)

NEW YORK LIFE INSURANCE COMPANY

Division **F**
OREGON Branch Office

Daily Premium and Commission Report

Entries on this sheet made by *John A. McLean* *W. J. Williams* Cashier

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21-22	23-24	25	26
DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS	DATE	PREMIUM	DETAILS
10-15		W. J. Williams																					
10-16		W. J. Williams																					
10-17		W. J. Williams																					
10-18		W. J. Williams																					
10-19		W. J. Williams																					
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12-29		W. J. Williams																					
12-30		W. J. Williams																					
12-31		W. J. Williams																					

The Court: We might kind of cast ahead here. How long will your case from the witness stand take?

Mr. Davis: The defendant's?

The Court: Yes. I suppose you are going to want to be heard, and maybe rather fully, on your view of the law that there is no case for the jury here?

Mr. Davis: We will want to make that argument.

The Court: Yes. And it may be you may want to make that at [83] the close of plaintiffs' case. That is one of the questions you had just as well decide now as later, because Mr. Neuner is about at the end of his case now.

Mr. Davis: We had considered that proposition of making the motion at the close of his case. We have introduced our exhibits, which are part of our case, and we don't believe that the testimony we will have will help them any, so——

The Court: At the close of the whole case, then?

Mr. Davis: Yes.

The Court: Including the rebuttal, if any. Now the question is, about how long will your case take from the stand?

Mr. Davis: Probably not over half an hour.

The Court: We may get through with all the testimony then this afternoon?

Mr. Davis: I would think so.

Mr. Huntington: Except, if the Court please, we will have to get an attorney up here. I have

arranged for him to be available but he may get away if we don't hit along pretty fast.

The Court: Yes.

Mr. Huntington: Will the Court hold until five?

The Court: We will do whatever is convenient. Would it be possible to make legal arguments this afternoon? I have heard this case pretty fully at the pre-trial; I have studied it pretty hard and my mind is not closed but I formed an opinion about it a pretty good while ago. [84]

Mr. Huntington: We could try to get the attorney. If not, we could close except for that testimony. Then we could present our motion.

The Court: All right. We will probably be ready, if the arguments are concluded, to submit it the first thing in the morning to the jury. Now then, if it is to be submitted are instructions prepared?

Mr. Davis: We have prepared some.

The Court: Have you prepared instructions?

Mr. Neuner: Yes.

The Court: We will take a few minutes, then you close, and then you put on your testimony. By the way, I want to say that this pre-trial order I thought was a fine piece of work on both sides, as well as the briefing. Really I mean that.

Mr. Neuner: If your Honor knew how we sweat over that you would agree with us that it is a very merited comment from the Court.

Mr. Davis: And duly appreciated.

Mr. Neuner: And duly appreciated.

The Court: I think, if I am ever called on to write anything out and have it printed growing out of this case, I will cite this pre-trial order as a model. Judge Fee did that a while back, and I think that is very worthy of it? Now in signing the pre-trial order I call your attention to the language of Rule 16, which is our rule on pre-trial procedure, "Such order [85] when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Our view here is that the pre-trial order supersedes the pleadings. Our conservative lawyers—and most lawyers are inclined to be conservative—go back and patch up their pleadings, as Mr. Neuner did this morning, to accord with developments at the pre-trial conference. That is not an unusual thing, but I doubt very much myself—I may be getting a little out of bounds in making this statement, but I doubt very much if that is necessary under this procedure. We don't read the pleadings to the jury any more, as is done I believe still in the state practice, and used to be done here under the Conformity Act; nor do we send our pleadings to the jury room, nor for that matter do we send the pre-trial order to the jury room. Generally speaking, we treat the pre-trial order as superseding the pleadings, and in signing this, as in signing other pre-trial orders, that is the thought I had in mind.

Mr. Davis: Does the pre-trial order go to the jury?

The Court: No.

Mr. Davis: Do they get to be advised of the admitted facts?

The Court: Yes. Oh, we all pick that up among ourselves. You do it in your argument, and I try to fill in any gaps here by calling attorneys' attention to it, so it works out satisfactorily that way. [86]

Mr. Davis: If the Court please, with respect to the pleadings and the amendment which was offered by plaintiffs, in reviewing our answer to the amended complaint I think that our answer to that paragraph would fit in with the allegations of the amendment to the amended complaint, with the exception that they allege there that they gave a check; but in view of the late amendment I think that our answer could stand as a denial of the amendment to the amended complaint.

Mr. Neuner: Yes. That is agreed to.

The Court: Now, gentlemen, in case the case is submitted I won't know, until I see your instructions and hear your arguments on them, just how particularly the plaintiffs are going to claim the right to argue this case to the jury and how the plaintiffs are going to feel I should submit it. Now that has some relation to the comment I have just made about the pleadings and the pre-trial order, because, frankly, gentlemen, the pre-trial order states broader issues than the pleadings do. The pleadings are drawn on the basis of payment. The pre-trial order states broader issues—payment,

as I read it, and, in the alternative, waiver, estoppel, ratification.

Mr. Davis: Well, we don't so recognize the pre-trial order as stating anything there that would constitute waiver or estoppel, or any facts that amount to ratification. Now that is our position.

The Court: Just say that again, will you, just what you have [87] said.

Mr. Davis: It is our position that the pre-trial order does not show any facts which constitute a waiver or an estoppel or ratification. It merely states that the plaintiffs' contentions are that, but we don't agree that there are any facts in there from which a waiver could be——

The Court: No, I understand.

Mr. Davis: Or that there is any issue of waiver made up.

The Court: I understand. What?

Mr. Davis: Or that there is any issue of waiver made.

The Court: That, what you have just said, is different from what you said a minute ago. What you said a minute ago was you didn't agree there was waiver. Now you have said you don't agree there is any issue of waiver in the case.

Mr. Davis: Because we have stated, and the pre-trial order states, the defendant's contentions and states there are no facts or issues in the case upon which a waiver or estoppel can be based.

The Court: Well, I have said my say and made enough trouble for once. Your instructions, if

the case is submitted, will probably provoke the discussion further along these lines.

Mr. Neuner: Does your Honor wish them to-night?

The Court: The sooner the better. We will see what turn things take here when we come back.

(Thereupon Court took a recess at 3:48 o'clock P.M. [88] until 4:00 o'clock P.M., at which time Court reconvened and, the jury being present, the following further proceedings were had herein:)

Mr. Neuner: Mrs. Miller, will you take the stand.

RETA D. MILLER

resumed the stand as a witness in behalf of the plaintiffs and the following occurred:

Mr. Neuner: You may cross examine.

Mr. Davis: The defendant has no cross examination.

Mr. Neuner: That is all, Mrs. Miller.

(Witness excused.)

Mr. Neuner: We rest.

Mr. Huntington: The defendant will call Mr. Howell.

DEFENDANT'S EVIDENCE

F. C. HOWELL

was produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Huntington:

Q. You are Mr. Frank C. Howell?

A. That is right.

Q. And you reside at Portland? A. Yes.

Q. And what is your profession? [89]

A. Lawyer.

Q. How long have you practiced law?

A. Thirty years or a little more.

Q. And how long in Oregon?

A. That length of time. I have practiced exclusively in Oregon.

Q. You are admitted to practice in the Oregon Supreme Court and lesser courts of the state, and the Federal Court of Oregon? A. Yes.

Q. And other federal courts, the Circuit Court of Appeals for this Circuit?

A. That is right.

Q. In your experience in the practice of law have you handled cases involving claims on insurance policies, claims of various kinds?

A. Yes.

Q. Both for the claimant and also for the defendant? A. Yes.

Q. At different times. I am going to tell you

(Testimony of F. C. Howell.)

certain facts that you may assume for the purpose of this question are true, and based on those facts I will then ask you what you think is a reasonable attorneys' fee in such a case as I describe. You may assume that the facts are as I state them. This case involves claims on two policies of life insurance issued by a life insurance company on the life of an individual, one for a face amount of \$3,000, with a double indemnity provision for an additional [90] \$3,000 in the event of death by accidental means, and also a family income provision for payment of \$30 a month from the time of submission of proof of death, which you may assume as in December, 1940, down to July 17, 1954; that policy provides that those income payments of \$30 a month will be paid monthly over that period; at the end of the period the face amount, \$3,000 will be paid and the double indemnity feature of \$3,000 would be paid immediately upon receipt of due proof of death, if the policy, of course, were in force at the time. The other is a similar policy but the amount is \$2,000 face, has the same double indemnity provision and the family income provision of \$20 a month, and you may assume from the same time but up to July 18, 1959. The action is in this Court, as you understand, and it involves two causes of action, one on either policy. The issues are with respect to whether or not the policies were in force at the time of death, on December 3, 1940. The con-

(Testimony of F. C. Howell.)

tention is made that certain premiums had been paid prior to that time so as to have the policies in force, and the defendant Insurance Company is claiming that certain premiums had not been paid and that both policies had lapsed prior to the time of death and had not been reinstated. There was the complaint, an amended complaint, and then the defendant filed an answer; the case went to pre-trial, involving two pre-trial conferences of approximately one-half day each; certain questions were briefed extensively; the case then is in court for [91] trial, you may assume consuming not more than two days' time for trial in court. Now assuming those facts to be true, what in your opinion—excuse me; there is one other thing I should say, that the issues with respect to the two policies are identical; in other words, under the facts if the plaintiffs should prevail on the first cause of action then plaintiffs would also prevail on the second cause. There is no difference in the facts involved in the two policies. Now with those matters in mind, assuming them to be true, what would you say would be a reasonable attorneys' fee for the attorneys for plaintiffs in handling that case?

A. In the larger policy the monthly payment was \$30 a month?

Q. That is right.

The Court: The gross of the two of them it has been stated is eighteen to twenty thousand dollars.

(Testimony of F. C. Howell.)

Mr. Huntington: Yes. You may assume that the gross amount, without computing present values of those monthly payments, the gross amount of eighteen thousand to twenty thousand dollars is involved in the two cases, the two causes.

A. I should say \$1500 would be a reasonable attorneys' fee, in my opinion.

Q. And how would you divide that between the two causes, if it became necessary?

A. Proportionately as one bears to the other.

Q. Proportioned to the amounts involved? [92]

A. Yes.

Mr. Huntington: You may take the witness.

Cross Examination

By Mr. Neuner:

Q. You are a member of the firm of Wilbur, Beckett & Howell?

A. Yes; and Oppenheimer.

Q. Your firm represents several insurance companies, casualty companies?

A. Quite a number.

Mr. Neuner: Yes. That is all.

(Witness excused.)

Mr. Davis: Defendant rests.

Mr. Neuner: We rest.

The Court: Gentlemen of the jury, I think you need a little holiday. I don't think you need to stay the rest of the day, but I would like for

you to come back at half past nine in the morning.
You may retire.

(The jury here retired and the following proceedings were had without the presence of the jury:)

Mr. Davis: If the Court please, the defendant now moves the Court for an order directing the jury to return a verdict in favor of defendant on plaintiffs' first cause of action, and also on plaintiffs' second cause of action, on the grounds and for the following reasons: [93]

There is no evidence that the premiums due on October 17, 1940, on the policies of insurance involved in plaintiffs' two causes of action were paid when due, or during the grace period, or at all. There is no evidence of any agreement binding upon the defendant that it would accept, or that it did accept, the check dated November 17, 1940, payable to the order of defendant, as absolute or unconditional payment of the premiums due October 17, 1940, on said policies of insurance. There is no evidence of a waiver of the provisions of the policies of insurance involved in plaintiffs' causes of action with respect to the payment of these premiums. There is no evidence that the time of the payment of the premiums due on said policies on October 17, 1940, was extended beyond the grace period or at all.

I presume that the Court would like to hear argument.

The Court: Yes.

(After argument, pro and con, the Court ruled as follows:)

The Court: I will deny the motion for directed verdict and allow the defendant an exception, and I will instruct the jury. I will advise the attorneys before submission, in general how I am going to instruct them. I will instruct them along the lines, as to plaintiffs' theory, of the statement I just made, that the method of payment provided in the policy, also referred to in the premium receipts, it is claimed by the plaintiffs, who [94] have the burden of proof, was departed from in this case by giving an acceptance of this check in payment, and I may use the expression "waiver"—waiver of the kind of payment in the policy normally called for, namely, in cash. I will say nothing about waiver of forfeiture. It seems to me the only reference, in submitting the plaintiffs' theory, to forfeiture would be that if they found, as plaintiffs claim, that check was accepted in payment, if they find the payment in cash was waived, which is the same thing, then they would have no right to forfeit the policy, even though the check was not paid, which turned out to be the fact. And, of course, I will tell the jury that the defendant disputes vehemently that there was an acceptance of the check, either a giving or acceptance of the check in payment, or that there was a waiver by the defendant of the normal requirement of payment in cash. I think I will be pretty brief about it. You have got a point in here, Mr. Davis, that

has not been discussed very much, that this Oregon office here had no authority to vary the terms of the policy as to the manner of payment. You claim that, don't you?

Mr. Davis: Yes.

Mr. Huntington: That is expressly provided in the policy. Neither the soliciting agent, nor the cashier, has any authority to vary the provisions of the policy, to waive any rights or requirements. And, furthermore, there is this matter, too: [95] The premium is only payable in exchange for the official premium receipt.

The Court: Let me make what I understand to be your position as to that a little clearer. You claim there is nobody here in this Oregon office—I say Oregon office; the testimony was that this office looks after the Oregon business of the company—there is nobody in this Oregon office who would have authority to agree expressly with this policyholder or any other policyholder to take his check or note in payment, don't you?

Mr. Davis: As unconditional payment.

The Court: Well, as claimed here?

Mr. Davis: As claimed here, yes.

The Court: Yes.

Mr. Huntington: That is not true in respect to a note for the first premium.

The Court: I understand the distinction. Now you have never had much to say about that on the other side. You don't have facts in this case like in the John Hancock case.

Mr. George Wm. Neuner: No. They had a general agency.

The Court: And where they show what the transaction was with the home office.

Mr. George Wm. Neuner: That is correct, your Honor. I might state that the cases make this distinction: That although those particular terms or conditions are in the policies themselves, still that does not govern the agency that may exist between [96] the insurance company itself and any of its particular agents. In other words, that an agency is determined by other facts and circumstances and the policy does not control that agency. Now, in this case Mr. Durham testified that his work was to collect premiums and that he had possession of and was responsible for the premium receipts. He had authority to endorse New York Life checks and to deposit those to the New York Life's account. In *Republic Life v. Hatcher*, cited in our brief, 51 S. W. (2d) 922, the court said: "The agent had authority to collect the premium, and the acceptance of a postdated check therefor was within the apparent scope of the agency." That point was specifically raised in that case.

The Court: Well, I am interested in two things about this. One is, Mr. Huntington and Mr. Davis claim straight out as a matter of limitation on Mr. Durham's authority, with notice to the policyholder in the policy, Mr. Durham would have no authority to do expressly anything here to bind the company, which you claim he did impliedly. Secondly,

if I should not feel that strongly about it, is there a question of fact here to be submitted to the jury as to his authority? You have offered no instruction on that. In other words, can a general agency in Oregon of this company, or any other company, in matters of this kind, vary the terms of the policy in the manner of payment? We have the statute that you are all familiar with and you cite it here, which I don't think applies—we have dealt [97] with it in other cases, Judge Fee and I—that the soliciting agent can bind the company as to all matters connected with the origination of business. We have had that statute in several cases. Here you have a question having to do with a policy long after it was solicited and written.

Mr. Neuner: Yes, that is true. The statute provides the application of the policy and the policy issued in consequence thereof.

The Court: Well, all I can say is that I hope you find some comfort in that statute in this case, but I don't think it applies, and, in candor, if I submit the case, as I am inclined to do as to that agency question, I won't be relying in my own mind on the statute.

Mr. Neuner: I debated a long time whether I should put it in or not before I read the case that I think your Honor refers to here that went up to the Circuit Court of Appeals.

The Court: Yes. There is the United States Supreme Court late case.

Mr. Neuner: Stipcich.

The Court: Yes; and we had a case here from Southern Oregon dealing with it, and Judge Fee had occasion to deal with it in *Cole v. Northwestern Life Insurance Company*.

Mr. Neuner: I appreciate that was a little different. That was the question of information or insurability of the applicant.

The Court: That had to do with solicitation or the origina- [98] tion, taking the application.

Mr. Neuner: Yes.

The Court: Here is some insurance that was more than a year old, about a year old or longer.

Mr. Neuner: But we take it in this case, of course, that the branch office of the company was in Portland, the receipts were in its possession, they had the collection of the premiums, they had the right to endorse, and, coupled with that, they licensed their agents. Now Yount testified that over all these years he was very intimate with this man, was his adviser; and, coupled with the fact that he dealt with the office itself, why, I can't for the life of me see where there could be any question about the agency. And, furthermore, if they accepted, if he accepted that, they again waived the provisions of the policies, and those provisions having to do with that particular thing, that no one is authorized to vary the terms thereof.

The Court: Except the designated——

Mr. Neuner: Except the vice president, the president, vice president, the secretary and treasurer, I believe.

The Court: Well, there is something in there that you can rely on that slipped your mind for a minute; it had mine. There is something in that language, Mr. Davis, about the manner of payment, which says "except by one who has in his possession the premium receipt". What is that?

Mr. Davis: It says, "No person has any authority to collect [99] a premium unless he then holds said official premium receipt." That is right after "All premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt." Is that the wording you referred to?

The Court: Well, I guess so.

Mr. Davis: It says further, in that same paragraph, "The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this policy in force beyond the date when the next payment becomes due, except as to the benefits pro-

vided for herein after default in premium payment." Now the mode of payment they are attempting to change.

The Court: I wouldn't think it meant mode of payment right there; I think it meant quarterly, semi-annually, and so on.

Mr. Neuner: Yes, that is what it referred to.

The Court: There must be some law some place that you plaintiffs have forgotten about, that a general agent of a life in- [100] surance company in a state of a million people has more authority on this subject than Mr. Huntington and Mr. Davis are willing to concede at the moment. I would think that Mr. Durham could take a promissory note and grant a couple of days beyond the grace period.

Mr. Davis: No.

The Court: Mr. Davis says no.

Mr. Davis: We would not agree to that. No, sir.

The Court: Now to be serious again, you are completely at odds about that. Mr. Davis says it is a matter of law that he can't on the facts we have before us here and you, on the other side, say as a matter of law that he can on the facts we have before us. Mr. Davis says there is no question to put to the jury, either on this or anything else to the case, and you say there is no question to go to the jury on this.

Mr. Neuner: On what?

The Court: On the agency, on his authority.

Mr. Neuner: Well, I don't think so.

The Court: Well, that is what you have said so far.

Mr. Neuner: That wasn't raised by the motion for a directed verdict anyway.

The Court: You can count on it being raised.

Mr. Davis: Well, when we say there is no evidence to submit to the jury, that covers the matter.

Mr. Neuner: Oh, yes, that covers the features of agency. [101]

The Court: Better not treat it too lightly, Messrs. Neuner. Well, we will meet again at nine thirty.

Mr. Neuner: 93 Ore. 473, covers that question of agency in the case of *Hinkson v. Kansas City Life Insurance Company*. I haven't the instructions but they were very voluminous, and it deals with the matter.

The Court: Well, I will ask you both to be prepared to argue the case in the morning at nine thirty.

(Thereupon, at 5:27 o'clock P. M., Court was adjourned until tomorrow, Wednesday, January 21, 1942, 9:30 o'clock A. M., at which time Court convened pursuant to adjournment and arguments were made to the jury in behalf of the respective parties, after which the Court charged the jury as follows:)

CHARGE OF THE COURT

The Court: I don't believe, gentlemen, it will take us long to wind this case up, so, unless you have some objection, we will stay and do it now.

The controlling question, I am sure you understand—you are veterans in jury service now—the

controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

Now just a word about that. Ordinarily a check is [102] given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. She must satisfy you, by a preponderance of the evidence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence as to the intention of the parties—that means both parties—then your verdict must be for the defendant.

Now just to state it again, Did Miller intend that the check was being given by him as payment? By that, from his point of view, meaning simply this: That whereas up to that time he had no obligation to pay the insurance premium—I think you understand that clearly; I will mention it again; the

lawyers have mentioned it on both sides—in the ordinary insurance transaction, and that is true of this one, there is no obligation to pay the premium. You may pay the premium, and if you [103] do you keep the policy in force; if you don't pay the premium the policy lapses.

Now the question is in this case, Did Miller intend to bind himself, and did he bind himself, to pay the premium? Was his intention in giving that check, so far as his part of it was concerned, that it should be obligatory upon him and be enforceable against him so that when he executed the check he had in mind that he had committed and obligated himself to pay the premium by giving that check?

But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. There must be a meeting of the minds, as Mr. Davis said, before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case, did they treat this check differently than the ordinary check, which, as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business day after its due date, was it the intention of the defendant in thus dealing with the check treat that as payment; by that I mean to treat that as a binding obligation given to them by Miller, which they could enforce in the way that all obligations are

enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the [104] check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle the plaintiffs to recover in this case, should you so find from a preponderance of the evidence.

Now as I say, that is the controlling question in the case.

I am going to say a few things especially, particularly about the defendant's position in the case. I just want to add one thing more, though, before I leave that summary that I made in opening as to the controlling issue.

The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you, gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any one of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have au-

thority to bind the company, to accept the check as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions [105] to you as questions of fact.

Now dealing especially with some phases of the defendant's position, you have a number of exhibits in the case here. We boil these trials down a lot by our pre-trial procedure. We think that is the modern way of doing things, and it reduces the time of jury service that we must ask of you and other citizens. But I would not want, in this case or in any case, any party to be prejudiced by the fact that his case did come in rather briefly. I would not want the impression to be created that that was because there wasn't much to his case. There has been a good deal of time spent in this case, and in others, preliminarily in the presentation of the theories of the parties and in identifying and getting in evidence the written evidence. You will find a good many exhibits in this case, when you get to the jury room, that have been offered by the defendant as well as by the plaintiffs, and the fact that nothing has been said about them here to speak of does not take away at all their weight or value as you may find.

Now in the policies—the policies, I take it, as to the body of them, are the same—in the policies and in the premium receipt are certain clauses on which the defendant especially relies in the as-

sertion of its two main positions, that this check was not accepted in payment, and that the cashier here did not have authority to bind the company to accept it as payment; and I will ask you to examine all the [106] exhibits closely, and particularly to examine the policies and the premium receipt for these clauses that I will now call to your attention; not that I am seeking to make any expression as to facts in the case. You are the sole exclusive judges of the credibility of the witnesses, and the weight and value of the testimony, and if I appear to make any expression here on the facts as if I were indicating to you any opinion of my own on the factual situation, please disregard it. My intention and all I am trying to do is to make an explanatory statement to you that will be helpful to you as the sole and exclusive triers of the facts.

Now from a memorandum defendant has handed me I read a portion of the policy, which is the contract:

“This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract.”

I am skipping a little because I just don't think it applies to what I am discussing.

“No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the company's rights or requirements.”

And I am skipping a little more for the same reason. Now I am quoting from a clause in the policy that has been called to my attention by the defendant's attorneys.

“Payment of Premiums.—All premiums after the first [107] are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt.”

And I am dropping a little out that does not seem to me to apply; and now, reading further:

Title “Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.”

In this case it happened that the thirty-first day, the last day of grace, came on Sunday. That was the date that was on Mr. Miller's check. It is my

opinion, for whatever bearing it has in the case, and I instruct you that, as a matter of law, that grace period was extended until the next day. That was the day the company deposited the check in the bank, the next business day. It is my view of the law that this premium was payable up to and including the thirty-second day, because the thirty-first day came on a non-business day—on a non- [108] secular day.

Now there is one other portion of the documents in the case that the defendant has called to my particular attention and I call to your particular attention, for such consideration as you feel it is entitled to, along with all the other evidence in the case. That is the language in the premium receipt which was mailed out, as you remember, on the 18th, the day when Mr. Miller's check was deposited. The language is, "If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the company."

The defendant's position in the case is that it accepted this check, as I said before, with considerable elaboration, the same as any other check, subject to its payment in cash when it was presented; and, as I said before, should you not be convinced to the contrary the defendant would be entitled to your verdict.

There is no need for me to say to you men, skilled and experienced here in work as jurors—I know there isn't; I know you too well for that—that you

are not to be controlled by any sympathy, passion or prejudice in this case. Treat this case simply on the evidence presented here and, under the instructions that I have given to you, decide the case dispassionately. I ask you to do that, and I know you will.

Just one or two little passing things. As to the [109] part that Yount played, who picked up the check out at Mr. Miller's place, I instruct you, gentlemen, that what he did could not bind the company. He served, as I view it, as the intermediary whereby Mr. Miller's check was brought to the company. Only what the company did with the check after it came to the Cashier's office could bind the company, and only then, if you find that, as I said to you before, Mr. Durham had authority to bind the company as to the issue here in question.

Now as to this money order which Mrs. Miller mailed after she found in the mail—you recall the dates, I am pretty sure; due to the holidays and for other reasons the mail seemed pretty slow in getting back and forth; it always has to me; no blame attaches to anybody, nor is there any particular significance to it, but that is one of the facts in this case that struck me from the beginning, how slow the mails were going back and forth between Portland and McMinnville. The fact was, I remember it, that on the 18th the company deposited Mr. Miller's check here and mailed to him the premium receipts. That was on Monday, and that got out to McMinnville on a Wednesday, as I remember

it; the check was turned down and came back to Portland, and the bank here where it had been deposited notified Mr. Durham's office on the next Monday. An even week elapsed between the time the check was deposited here and Mr. Durham's office was notified that the check had been dishonored. Then, as I remember it, on the next day Mr. Durham's office wrote [110] a letter to Mr. Miller, advising him that the check had been dishonored and asking him to execute this personal health certificate that has been referred to. Mr. Miller never got that letter; he had been injured in the meanwhile and was in the hospital; but Mrs. Miller got it and right away, so she testified—all these things that were testified to are for you to accept or reject, as you view the testimony, but she testified, as I remember it, that right away, as soon as she learned what had happened to this check, she got the money, including the interest charge that had been added, and put it in the form of this money order and mailed it in to the office. Now as to that payment by her, gentlemen of the jury, that is just one of the later circumstances in this case. That does not bear on the controlling questions in the case. What they did with that money order, the fact that she sent in that money order, what the company did with the money order, does not bear on the controlling question in the case. As I say, it is just one of the later circumstances, just as we provide you with information as to some of the preliminary circum-

stances in the case. The controlling circumstances in the case run from the time Mr. Miller gave the check to Yount, who took it on in, and what the company did with it thereafter, not what occurred after the check was dishonored.

Statements made in argument by the attorneys are not evidence. Such statements, arguments, comments, or suggestions, [111] are not evidence and must not be considered by you as such, and they must not be considered for any purpose.

Any evidence offered and rejected, or which has been stricken out by the Court, such evidence is to be considered by you as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced and inferences which you may draw therefrom, and upon the law as given you in these instructions.

Your verdict must be unanimous. You will elect a foreman when you retire, who will return your verdict for you.

The question of attorneys' fees is in the case. I have here two forms of verdict. You will sign one or the other, and you will agree which it is you will sign. If your verdict should be for the defendant, if that is your verdict, it is in the usual form. The verdict for the plaintiff is a little different than the usual form. Should your verdict be for the plaintiff it reads, "We, the jury duly empaneled in this action, find in favor of the plaintiffs and assess the sum of blank dollars as attorneys' fees in this action."

Now you notice, should that be your verdict, that you don't find any particular amount for the plaintiffs. That is because of certain calculations which will have to be made by us in the preparation of the judgment. But this permits you, should you find that the premium was paid and Mr. Durham had the authority that I have spoken about to bind the company, [112] should that be your verdict for the plaintiff, this permits you to find liability against the defendant and in favor of the plaintiff and it leaves only the question of attorneys' fees, the only question in dollars you will return. You have heard the evidence as to that. You are the sole and exclusive judges of what amount should be found for that. Should your verdict be for the plaintiff you should fill that amount in, should that be your verdict.

Now will you gentlemen please come with me for a few minutes; and we won't detain you much longer, if you will just remain in your seats.

(The Court, counsel, court reporter and the clerk here retired to the Judge's chambers and, without the presence of the jury, the following occurred:)

The Court: Will the plaintiff state its objections and exceptions to the charge, please.

Mr. George Wm. Neuner: We except, first, to the Court's ruling to the effect that the usual giving of a check is only conditional payment, in that no distinguishing statement was made as to whether there was a pre-existing or contemporaneous liability, or whether there was no pre-existing liability.

Also except to the Court's instruction that the grace period in this case extended to the next business day where the last day of grace, the last of the thirty-one-day period, fell on a Sunday. [113]

Also except to the Court's instruction to the effect that what the agent Yount did does not bind the company, and particularly that if the company by taking the check or otherwise ratified those acts, what Yount may have done would then bind the Company.

Also except—and I take it generally—except to the Court's failure to give Plaintiffs' Requested Instructions numbered 1, 2, 3 and 4; and particularly 3 and the general subject matter of a postdated check.

The Court: George, senior?

Mr. George Neuner: I think that covers it, except we would like to except to the——

Mr. George Wm. Neuner: We also except to the failure of the Court to instruct that slight evidence would suffice to show the acceptance of the check as payment, wherein there is a forfeiture involved, on the ground that courts abhor a forfeiture of a life insurance policy.

The Court: Objections and exceptions of the plaintiff are respectfully overruled. Now will the defendant state its objections and exceptions. While our rules don't use the word "exceptions" any more—they use the word "objections"—I am considering "exception" wherever used here by the lawyers—sometimes they fall into the old parlance—as meaning objections under our rules.

Mr. Huntington: If the Court please, the defendant objects [114] to the following instructions which were given by the Court:

The instruction with respect to submitting to the jury the question of Mr. Durham's authority as agent. Our objection there goes to this point: That the evidence is uncontradicted as to the authority of Mr. Durham; it is a matter of law and not a matter of fact or an issue to be submitted to the jury.

The Court: And there, Mr. Huntington, as we developed yesterday, you claim as a matter of law that he did not have such authority?

Mr. Huntington: That is true, your Honor. We think the record shows that all the way through, both from the agreements in the policy and particularly with respect to his lack of authority to waive any requirements or rights, and his lack of authority, or the authority of anyone, to collect the premium, or agree to the payment of a premium, except in exchange for the company's official premium receipt.

The defendant objects to the instructions with respect to submitting to the jury the issue as to whether or not there was an agreement between the insured and the company to accept the check as payment.

One reason for this objection is that the agents who acted in this regard were not authorized to make any agreement or to accept the check as unconditional payment. We think, furthermore, that the instructions referred to the payment. [115] They omitted the unconditional feature of the payment.

They omitted to state, in connection with submitting this issue, that a check may be taken as conditional payment and in that event payment is not finally made unless the remittance is paid.

Now the Court gave, in a different form, some of the instructions we asked for, particularly instructions from 3, and Defendant's Requested Instructions 3, 4, 5, 6, 7, 8 and 9. We think the instructions as requested state the law accurately and should have been given in the form submitted, in order to get before the jury the defendant's theory of the case, if it were to be submitted at all.

Furthermore, we object to the failure of the Court to give the Defendant's Requested Instruction No. 1.

The Court: The defendant's objections and exceptions are respectfully overruled.

(Thereupon the Court, counsel, the court reporter and the clerk returned to the court room and in the presence of the jury the following occurred:)

The Court: Swear the bailiffs.

(The two bailiffs were here sworn.)

The Court: Be sure to date your verdict, gentlemen. You may now retire with the bailiffs, and the clerk will sort out the exhibits and send them up to you right away.

(Thereupon the jury retired in charge of the bailiffs at 12:27 o'clock P. M.) [116]

REQUESTED INSTRUCTIONS

The following written instructions requested in behalf of the defendants were submitted to the Court:

The defendant requests the Court to instruct the jury as follows:

I.

You are hereby instructed to bring in a verdict in this case in favor of defendant.

If the Court refuses to give defendant's requested instruction No. 1, then the defendant requests the Court to instruct the jury as follows:

II.

This case involves two causes of action commenced by plaintiffs against the defendant to recover certain sums of money alleged to be due the plaintiffs or to become due the plaintiffs by reason of two policies of insurance on the life of Warren L. Miller, and in which the plaintiffs were named as beneficiaries.

In these policies of insurance the defendant agreed to pay the plaintiffs as beneficiaries certain sums of money at the time mentioned in the policies. The amounts to be paid under the policies are not in dispute if it should be found that the policies were in force at the time of the death of said Warren L. Miller. [117]

The policies contained provisions to the effect that they were issued in consideration of the payment of the premiums provided in said policies. Under the terms of these policies a premium became due on each of the policies on October 17, 1940.

Each of the policies contained a provision to the

effect that if any premium is not paid on or before the day it falls due the policyholder is in default, but a grace of thirty-one days will be allowed for the payment of each premium after the first, during which time the insurance continues in force.

Plaintiffs have alleged and the defendant has admitted that the insured died on the 3rd day of December, 1940. The plaintiffs have also alleged that the policies were in full force and effect on the 3rd day of December, 1940. The defendant has denied that the policies were in full force and effect on the 3rd day of December, 1940, and alleges that the quarter-annual premiums due on said policies on October 17, 1940, were not paid, and by reason thereof the policies lapsed for non-payment of premiums prior to the 3rd day of December, 1940, and were not in force on said date.

You are instructed that the burden of proving that said policies were in force on December 3, 1940, rests upon the plaintiffs and they must prove by a preponderance of the evidence that the premiums due on said policies on October 17, [118] 1940, were paid when due or within the period of grace allowed by the policies.

III.

You are instructed with respect to the time within which the premiums on said policies might be paid that the 31st day after the due date of the premiums due on October 17, 1940, fell on a Sunday, and therefore the insured had all of the next day or all of Monday, the 18th day of November, 1940, within which to pay the premiums due on October 17, 1940.

IV.

The premiums due on said policies were payable in cash at the Home Office of the Company or to a duly authorized cashier of the company, but only in exchange for the company's official premium receipt signed by certain officers of the company and counter-signed by the person receiving the premiums. No person had any authority to collect a premium unless he then held the official premium receipt.

V.

The evidence in this case shows that on November 13, 1940, the insured gave to A. E. Yount, a soliciting agent of the defendant, a check payable to the order of the defendant in the amount of premiums due on said policies on October 17, 1940. This check was dated November 17, 1940. There is no evidence that Mr. Yount had the official premium receipts for said policies. You are, therefore, instructed that Mr. Yount had no authority to collect the premiums due on said policies [119] and the giving of the check to Mr. Yount did not constitute payment of the premiums.

VI

Under the terms of the policies no agent is authorized to make or modify the policies or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the company's rights or requirements.

VII.

The plaintiff claims that the check, dated November 17, 1940, and given to Mr. A. E. Yount on November 13, 1940, and subsequently delivered to the cashier's office of the Oregon Branch Office, was accepted by the defendant company as payment of the premiums due on October 17, 1940.

You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.

In this connection you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was such an agreement between the insured and the defendant made by a person having authority to make such an agreement. [120]

You are further instructed that if such an agreement was made by an unauthorized agent, then before such agreement could be binding upon the defendant the agreement must be ratified by a person having authority to do so, and the burden of proof is upon the plaintiffs to show such ratification by a preponderance of the evidence.

VIII.

The evidence shows that the cashier of the Oregon Branch Office of defendant on November 18, 1940,

mailed to the insured the official premium receipts covering the premiums due on the policies on October 17, 1940. These receipts contained the following condition:

“If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the Company.”

The evidence further shows that the check dated November 17, 1940, for \$48.72 was dishonored by the bank on which the check was drawn because the drawer of the check did not have sufficient funds on deposit in the bank to cover the check.

The mailing of the official premium receipts is not evidence that the company accepted the check as unconditional payment of the premiums, and in view of the evidence that the check was not honored when presented for payment the premium receipts could not be considered as evidence showing payment of the premiums due October 17, 1940. [121]

IX.

The evidence shows that upon receipt of a letter from the cashier of the Oregon Branch Office of the defendant returning the dishonored check to the insured, the plaintiff, Reta D. Miller, mailed a post-office money order to the defendant on November 28, 1940. You are instructed that the mailing of this postoffice money order did not constitute payment of the premiums due on the policies and had no effect whatsoever upon the issues of this case.

X.

You should not be controlled in this case by any feelings of sympathy which you might have, but should be governed in your deliberations solely by the evidence in the case and the instructions of the Court without any prejudice or sympathy of any kind whatsoever.

XI.

You are further instructed that in determining any of the questions of facts presented in this case you have no right to indulge in conjecture or speculations not supported by the evidence, and I charge you it is your duty to find and determine the facts of this case from the evidence, and having done so, then to apply to such facts the law as stated in the instructions given you by the Court. [122]

XII.

Statements made in argument by attorneys in the case are not in evidence. Such statements, arguments, comments, or suggestions are not in evidence and must not be considered by you as such. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such evidence is to be considered by you as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and inferences which you may deduce therefrom and such presumptions as the law may deduce therefrom as stated by the Court to you in these instructions, and upon the law as given you in these instructions. [123]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the oral proceedings had, including all the evidence given, objections and rulings thereon and exceptions taken thereto, the charge of the Court to the jury and objections and exceptions taken thereto, upon the trial of the above entitled cause in the above entitled Court on January 20 and 21, 1942, before the Honorable Claude McColloch, and a jury; that I thereafter prepared a typewritten transcript from my shorthand notes so taken and the foregoing and hereto attached 123 pages of typewritten matter, numbered 1 to 123, both inclusive, contains a full, true and correct record of all the evidence given, all objections, rulings thereon and exceptions taken, the charge of the Court to the jury and objections and exceptions thereto, the instructions requested by the defendant in writing, and relevant [124] portions of the discussion and argument before the Court.

In Witness Whereof I have hereunto set my hand at Portland, Oregon, this 22nd day of June, 1942.

ALVA W. PERSON

Court Reporter.

[Endorsed]: Filed Jul. 27, 1942 [125]

[Endorsed]: No. 10258. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a corporation, Appellant, vs. Reta D. Miller and Warren D. Miller, Marcia M. Miller, minors, by Reta D. Miller, Guardian, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 21, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10258

RETA D. MILLER, Warren D. Miller and Marcia
M. Miller, Minors, by Reta D. Miller, Guardian,
Plaintiffs-
Respondents,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant-
Appellant.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the United States Circuit Court of Appeals for the Ninth Circuit, Appel-

lant, New York Life Insurance Company, a corporation, herewith furnishes a concise statement of the points on which it intends to rely on appeal, as follows:

1. The court erred in its refusal to direct a verdict in favor of defendant on each of plaintiffs' causes of action for the reason that there was no evidence that the premiums due October 17, 1940, on the policies of insurance involved herein had been paid when due or within the grace period, or that there had been any waiver of the provisions of the policies with respect to the payment of the premiums. Consequently, the policies lapsed for non-payment of the premiums and had no value whatsoever on the date of the death of the insured.

2. The court erred in receiving into evidence plaintiffs' Exhibit 6, 8-a and 8-c and admitting testimony relative to said exhibits and to matters occurring subsequent to the time defendant returned to the insured the check which he had tendered in payment of the premiums in question. Anything that occurred subsequent to the return of the check has no bearing upon the question of whether the premiums in question had been paid. The exhibits and the testimony referred to are irrelevant and immaterial to the issues involved in this case and their admission was prejudicial to the defendant.

3. The court erred in permitting the witness A. E. Yount to testify to conversations with the insured. A. E. Yount was a soliciting agent of the defendant

and had no authority to bind the defendant on any matters connected with the premiums in question.

4. The court erred in submitting to the jury the question of Mr. R. A. Durham's authority to accept a check as payment of the premiums in question, and erred in instructing the jury relative to his authority and his acceptance of the check. There is no evidence of any kind from which it could be inferred that Mr. Durham had authority to accept the check in question as absolute or unconditional payment of the premiums or to waive any of the company's rights or requirements with respect to the payment of premiums. In instructing the jury as to what constitutes payment the court failed to distinguish between absolute or unconditional payment and conditional payment. Ordinarily a check is given and received as conditional payment, and one claiming otherwise must prove it by clear, satisfactory and competent evidence. In this case there was no such evidence.

5. The defendant in its requested instructions set out its theory of the case and properly stated the law applicable thereto. The court in its instructions to the jury not only failed to give defendant's requested instructions, but in instructing the jury did so in a manner which was confusing and misleading to the jury. The court in instructing the jury did not accurately state the law applicable to the issues involved.

Pursuant to the above mentioned rule the defendant New York Life Insurance Company, a corpora-

tion, hereby designates the parts of the record which it thinks necessary for the consideration of the above mentioned points as follows:

All of said record needs to be considered, except only the following portions of plaintiffs' Exhibit No. 1 need to be considered, to-wit:

All of Page 1 of said exhibit; those paragraphs of said exhibit included under Miscellaneous Benefits and entitled "Grace," "Reinstatement" and "Rights of Insured;" those paragraphs included under Other Provisions and entitled "Payment of Premiums" and "The Contract;" the provisions entitled "Accidental Death Benefit;" and that paragraph of Part I of the application commencing with the words "It is mutually agreed," and ending with the signature "Warren L. Miller."

And only the following portions of plaintiffs' Exhibit No. 2 need to be considered:

All of Page 1 of said exhibit; those paragraphs of said exhibit included under Miscellaneous Benefits and entitled "Grace," "Reinstatement," and "Rights of Insured;" those paragraphs included under Other Provisions and entitled "Payment of Premiums" and "The Contract;" the provisions on Page 6 of said exhibit commencing with the words "This contract is made in consideration of," and ending with the attestation clause on said page, and that paragraph of Part I of the application com-

mencing with the words, "It is mutually agreed," and ending with the signature "Warren L. Miller."

HUNTINGTON, WILSON &

DAVIS

514 Porter Building

Portland, Oregon

W. M. HUNTINGTON

514 Porter Building

Portland, Oregon

ROLAND DAVIS

514 Porter Building

Portland, Oregon

Attorneys for Defendant

Appellant

State of Oregon

County of Multnomah—ss.

I, Roland Davis, hereby certify that I am one of the attorneys for Appellant in the above entitled cause; that on September 21, 1942, I placed a true and correct copy of the foregoing Appellant's Statement of Points and Designation of Record in an envelope addressed to Mr. George Neuner, attorney-at-law, McMinnville, Oregon; that George Neuner is one of the attorneys for Respondent in the above entitled cause; that said envelope was then sealed by me and deposited in the United States mail at Portland, Oregon, with first class postage fully paid thereon.

ROLAND DAVIS

Of Attorneys for Appellant.

In the District Court of the United States for the
District of Oregon

No. 779

RETA D. MILLER, and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by RETA D.
MILLER, Guardian,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant.

SUPPLEMENTAL MEMORANDUM

I desire to add the following as supplemental to my memo in this case of date April 20, 1942.

The questions of waiver, estoppel and ratification usual in insurance cases were not submitted to the jury. Only the questions of payment, and the authority of the company's State cashier to accept the postdated check as payment were submitted. Waiver, estoppel and ratification were plaintiffs' contentions. Defendant insisted that it would be improper to submit these (Trial Transcript pp. 87, 88), and failure to submit them could only be objected to by plaintiffs, as they did before the jury retired. (*id.* p. 114). In declining to submit waiver, estoppel and ratification I adopted defendant's theory that these issues were not in the case on the facts presented. Another reading the record might

take a different view, or on a re-trial, with more evidence offered, submission of these questions might be justified. The evidence offered on both sides was scant, because, on plaintiffs' part, only the testimony of Yount, defendant's agent, was available respecting the circumstances surrounding the giving of the postdated check, while defendant insisted after the pre-trial and identification of exhibits that there was no fact question to be tried.

That the deceased intended his postdated check to be an enforceable obligation seems beyond question.¹ He was a young man, had much to live for, but in the event of death,—to him, no doubt, a remote contingency—he had the reasons that impel honorable men in similar circumstances to protect the young wife and children who had blessed his life. Did he think of the postdated check, given for the premium on the two policies which had been in force for more than a year, as any less binding than the promissory note which he gave at the same time for the new and additional policy that he was taking out in favor of his boy, who was also one of the beneficiaries under the old policies?

¹Payment of the premium or agreement to bind himself to pay the premium was optional with insured until the last day of grace. Plaintiffs' theory was that insured intended to obligate himself by giving the postdated check, and that defendant by its method of handling the check accepted it as an obligation to pay. By this theory the consideration for the check was, of course, a continuation of the insurance in force for another period of three months.

From the company's point of view Miller was a good insurance prospect, as all industrious young heads of families are. As he acquired greater means, and his family increased in size, he could be sold more insurance. Counsel for the company with commendable frankness defended the case on the basis that the acceptance of the postdated check put the company on the same footing as if it had taken a promissory note. Could the company have taken a four day promissory note, under the circumstances of this case, held it until maturity, then in the event of non-payment, have properly denied liability on the policies?

Certainly, to use Mr. Davis' expression, there were facts from which the jury could find a "meeting of minds"—on the one hand, that the insured intended his check as payment (in this connection it should not be forgotten that insured's check stubs, plaintiffs' Exhibit 6, showed that he had a balance at all times); on the other hand, that the company intended to accept the check in payment. There was ample time to advise Miller before the end of the grace period if there was any company policy against accepting postdated checks. He could have been called on the telephone. Yount, the soliciting agent, who brought the check in, and who had an interest in the proceeds of the check, could have been directed to take the check back in person (McMinnville is but an hour's drive—old speed limit—from Portland), or the check could have been returned before the end of the grace period by mail.

The conclusion seems permissible that Miller's account was considered valuable enough that the company did not want to unsettle it by declining to take a postdated check, that to keep his business the company was willing to take the risk of collection of the check. So the jury's verdict may be read.

THE CASHIER'S AUTHORITY

That the cashier in charge of a branch insurance office in a large State may be fairly said to have had authority, as the jury found he did have, to accept a four day postdated check from an old customer in payment of a premium hardly admits of question, in view of *New York Life Insurance Company v. Rogers*, 9th Circ. (March 16, 1942), F.(2d)*, and like cases. One doing the volume of business done by Mr. Dunbar for the New York Life Insurance Company covering all the collections of the State of Oregon can properly be characterized as the company's General Fiscal Agent for the State. Protection of the insured public requires that this should be the rule.²

*I have been unable to find this opinion in the printed reports.

²On the day Miller's postdated check was deposited, 171 other items were deposited (Defendant's Pre-Trial Exhibit 12), most of the items obviously being premium payments from various parts of the State. The items deposited for the day totalled \$9734.95. Mr. Dunbar, the cashier, testified that half or more of the average daily premium payments received in the office came by mail.

General counsel for the company examining this claim in the East uttered too broad a dictum when he gave as a reason for the rejection of the claim: "a worthless check is not payment of a premium". Checks that later turn out to be slow of collection, particularly postdated checks given and accepted after prior business transactions between the parties, are not always treated as worthless as a matter of law. They at times represent an extension of credit for what seem to be good business reasons at the time, and on lawful consideration. The finding of the jury makes this such a case.

Defendant relies heavily on Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339. That case seems to have turned on the strong forfeiture clause in the policy.

Plaintiffs rely on John Hancock Mut. Life Ins. Co. v. Mann, 86 F.(2d) 783. The distinctions made in that case between postdated checks and checks presently dated seem to me to be valid. That there are important distinctions is well settled in the criminal law. The judges sitting in the John Hancock case felt that the postdated check should be treated the same as a promissory note. I was aided in the present case by Mr. Davis' frankness in conceding that there was no distinction (except, of course, that a note usually bears interest),—that the present case was to be tried as a matter of law the same as if Miller had given the company a promissory note due on February 17th, instead of a check bearing that date.

THE INSTRUCTIONS

Defendant contended at the argument for n.o.v. or in the alternative for a new trial that the instructions did not stress "unconditional" payment as distinguished from ordinary payment by check which is conditioned on the payment of the check. As to this, I said to the jury:

"..... the controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

"Now just a word about that. Ordinarily a check is given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question....."

The vehemence of the objections of plaintiffs' attorneys attested by their facial expressions and tone of voice, which only the trial judge hearing and seeing could appreciate, indicated that plain-

tiffs' counsel felt I had instructed strongly against them and too favorably to defendant, on this vital phase of the case, and frankly, my feeling in preparing instructions before convening of court on the closing day of the trial was that this was the kind of case where the fact questions, though narrow, were decisive, and that in the interest of an early settlement of the litigation, having in mind the beneficiaries' needs and at the same time the company's good name, I should instruct, if anything, favorably to defendant, although I could not go the whole length demanded by defendant that it had no liability as a matter of law. That is why I simplified the issue of payment, unfavorably I felt at the time to plaintiffs, submitting the issue only in terms of payment, and did not speak of waiver, ratification and estoppel, terms so usual in life insurance cases, and terms which in the event of a re-trial and possible enlargement of the facts might with propriety be employed in this case.

THE TIME SEQUENCE

(See Addenda)

Fate was unkind to Miller and his beneficiaries. There was no favorable "break" in the unfortunate sequence of events.

If Yount had noticed that the check was post-dated and urged Miller not to wait until the last day of grace to pay his premium, Miller might have given his check dated the 13th rather than the 17th. He had money in the bank to cover it that day.

If the branch office had deposited the postdated check in Portland on Thursday, to be held at the McMinnville Bank until its due date (as was done with the postdated check in *John Hancock Mut. Life Ins. Co. v. Mann*, 86 F.(2d) 783), instead of holding the check for deposit in Portland on its due date, some notice might have gotten to Miller, enabling him to replenish his bank account or to make other arrangements to pay the premium before the end of the grace period.

If it had not taken two days, Monday to Wednesday, for the check to go from Portland to McMinnville,—40 miles,³ and five days, Wednesday to Monday, for the check to be returned from McMinnville to the insurance company's office in Portland, and three days, Monday to Thursday, for the check to be received in the Miller mail at McMinnville, the day Miller was gored by the bull, insured would have had time while living to make the insurance good by paying the premium and furnishing the required personal health certificate.

If the McMinnville banker had been more neighborly, he would have found a way to advise Miller that he did not have sufficient funds on deposit before turning down his check, for what was obviously a life insurance premium.

³The premium receipt containing the restrictive language relied on by defendant could not have been received by insured until the grace period expired, and it probably did not reach him until after his check was turned down at the McMinnville bank.

Dated this 15th day of October, 1942.

CLAUDE McCOLLOCH,
Judge.

ADDENDA—THE TIME SEQUENCE

Wed., Nov. 13

Check given to Yount and delivered by him to
branch office.

Sun., Nov. 17

Last day of grace.

Mon., Nov. 18

Check deposited in Portland and premium re-
ceipts mailed.

Miller credited with payment of premiums and
Yount credited with his share in premiums.

Tues., Nov. 19

Wed., Nov. 20

Check received at McMinnville and payment re-
fused.

Thurs., Nov. 21

Thanksgiving.

Fri., Nov. 22

Check arrived in Portland at U. S. National
Bank.

Sat., Nov. 23

Sun., Nov. 24

Mon., Nov. 25

Check returned to branch office.

Tues., Nov. 26

Branch office mailed check to Miller with notice of lapse of policies and personal health certificate.

Branch office reversed entries.

Wed., Nov. 27

Branch office letter arrived at McMinnville.
Miller injured.

Thurs., Nov. 28

Mrs. Miller received branch office letter of 26th and sent money order in amount required for reinstatement.

Fri., Nov. 29

Money order received at branch office.

Sat., Nov. 30

Sun., Dec. 1

Mon., Dec. 2

Agent Yount saw Mrs. Miller.

Branch office returned money order.

Tues., Dec. 2

Miller died.

Money order received by wife after death of insured.

United States of America,
District of Oregon—ss.

I. G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Supplemental Memorandum, in cause No. Civil 779, Reta D. Miller, and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, Guardian, plaintiffs vs. New York Life Insurance Company, a foreign corporation, defendant, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 10th day of November, 1942.

[Seal] G. H. MARSH,
Clerk.

[Endorsed]: Filed Oct. 15, 1942.

[Endorsed]: No. 10258. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Reta D. Miller and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, Guardian, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 16, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.